Public Utilities

FORTNIGHTLY

September 26, 1946

IMPACT OF LABOR DISTURBANCES ON PUBLIC UTILITIES

By Luther R. Nash

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The Depreciation Problem
Part II.

By Henry Earle Riggs

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Pages with the Editors

THE recent drop in the value of shares on the New York Stock Exchange has caused quite a few experts to give various explanations on why the market acted as it did at this particular time. Naturally, prudent men would not care to jump to any conclusions about whether we are at the end of the bull market for the war period or what this means for the future.

BUT it is probably safe to venture the opinion that the reaction of the New York Stock Exchange represents pretty shrewd and unbiased judgment. After all, the Stock Exchange is one of the few remaining markets in the world where trading is free. Despite certain governmental limitations, the sharp reflection of the views of those who trade there has not been interfered with. Traders on the New York Stock Exchange are, therefore, skilled in analysis and valuation for the very good reason that that is the way they make their bread and butter. They sometimes err—but rarely from mere sentiment.

LUTHER R. NASH

LEADERS of economic life in other governments may express their disquiet by sending some people to jail or cracking down on one group or another. But, under our system, economic keymen show what they think by the simple process of selling stocks which they think are overvalued. The question naturally arises just why these skilled traders have decided that stocks are overvalued at this particular time. Public utilities were, on the whole, relatively firm, as compared with other shares. But when Union Pacific Railroad, General Motors, and Chrysler dropped from five to ten points in a single day, it would seem as though our economic keymen were doing some pretty serious pulse feeling on the contents of their portfolios.

ONE other observation which is warranted, as a result of the recent softening in shares, is that the stocks hardest hit were shares of corporations whose earnings have not been so good recently, according to Federal Reserve Board reports and other reference sources. Such studies show that net income of selected large corporations for the first quarter of 1946 has shrunk considerably as compared with the similar quarter of 1945, and even shows a loss in the case of the automotive industry.

IT seems reasonable to suppose that the market is registering a judgment by informal opinion that the earning prospects of these corporations, under prevailing uncertain economic conditions, are subject to a certain amount of revaluation. Of course, prudent men will never sell America short, but it may well

be that such sobering judgment in the financial quarter may spread to other quarters which have not, of late, shown too much stabilized judgment.

IF that should occur, this little season of retribution which the market has been undergoing may prove a helpful thing. It may bring about an atmosphere of restraint with respect to those inflationary forces which have been going pretty strong in recent months. Public utility companies in particular stand in need of such a check on the inflationary tendencies now at work.

THE old story of the rigid ceiling of regulated rates against an upsurge of increasing operating expenses for labor and materials is becoming a louder and louder complaint. And the shrunken net income of many utility companies testifies that the hand of this economic gauge is at the danger point. For years public utilities, particularly in the electric power field, have been able to absorb rate reductions in the face of increased operating expenses because of continually increasing gross revenue. But all the gross revenue in the world could not possibly make operations profitable when net income has once slipped below the point of a safe and reasonable return. In fact, it only complicates the situation. An interesting analysis of this recent "buyers' strike" appears in the financial department of this issue, page 427.

CONSIDER the fact that total national income in 1940 was $77,600,000,000. In 1945 it was $161,000,000,000. This represents an increase of 107 per cent. But the increase of salaries and wages during that period was 129 per cent (jumping from $48,600,000,000 to $111,400,000,000). Compare this with the more modest increase of only 55 per cent in net corporate profits, which is the form of income payments which go to people who hold corporate shares (which rose from $5,800,000,000 to $9,000,000,000).

WHAT is evidently happening here is a systematic redistribution of national income. The workers are making more while the investors are making less money from their respective activities. Apparently the impact of this trend has communicated itself to the large-scale or professional trader in corporate shares. His reaction would seem to indicate that he does not expect the net earnings picture to be more promising in the near future.

AND that is another way of saying he does not think it likely that the present trend will soon be reversed so that wages will come down and net income increase proportionately.

BUT the sobering effect of this cold water thrown from the financial district on some of our red-hot inflationary friends may well take place over a longer pull. When equity financing loses some of its attractiveness for the investor, corporate expansion, with its bigger and better jobs and payrolls, will start tapering off. Competition in industry for skilled labor and materials would ease accordingly. It may seem a little strange, at this particular period of high production, numerous shortages, and a national need for much more production, to be talking about such eventual deflationary influences. But past performance suggests that they may actually develop in the wake of the present drive towards higher production, unless the wider distribution of income payments evens out the gyrations of the business cycle.

* * * *

LUTHER R. NASH, whose article entitled "Impact of Labor Disturbances on Public Utilities" opens this issue, is a well-known authority on utility regulatory problems, particularly those having an engineering aspect. A graduate of Massachusetts Institute of Technology and Harvard (SM, '98), MR. NASH was for many years an official of the Stone & Webster organization and is now engaged in engineering consultation at his home in Ridgefield, Connecticut.

THE next number of this magazine will be out October 10th.

The Editors

In This Issue

In Feature Articles

In Government Utility Happenings

In Wire and Wireless Communication

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

ELLIOTT V. BELL
New York State Superintendent of Banks.

"There comes a point where cheap money ceases to be a bargain."

LEONARD P. AYRES
Vice president, Cleveland Trust Company.

"We are trying to have a low-production prosperity, and it can't be done."

ERIC JOHNSTON
President, Motion Picture Association.

"When the government starts taking over industry, that's collectivism, at least in incipient form."

ARTHUR CAPPER
U. S. Senator from Kansas.

"I feel myself coming to the point where I will have to conclude that Congress will have to enact legislation that will regulate labor as well as finance and industry."

WILLIAM E. WARNE
Assistant commissioner, Bureau of Reclamation.

"Low-cost power attracts industry and stimulates widespread and liberal use of electricity in the home. It is a potent factor affecting the prosperity, health, comfort, and general well-being of the people."

Excerpt from the June letter, National City Bank of New York.

"The right of the few to strike had come into conflict with rights of everyone else, including as most important the right of peaceable and industrious members of society to live and carry on their daily work."

LEO WOLMAN
Professor, Columbia University.

"Almost any labor dispute can be settled at a price. During wars and booms any price seems to work. But wars and booms fail to last as long as most people hope they will. Before long the time comes when a country must face the pay-off. The wrong settlements then cause firms to shut down, or shrink their operations."

EDITORIAL STATEMENT
The Wall Street Journal.

"What is true is that there ought not to exist the right to use the vital public interest as a strike weapon; in other words, no group ought to have the legitimate means to starve—using the word in a broad sense—the general public and thereby force someone, whether it be the government or a private employer, to meet the demands of that group."

EDITORIAL STATEMENT
The New York Times.

"New York is not alone in finding that fares of the past no longer suffice. Large cities all over the country are making the same discovery. The difference is that New York has failed to do something about it."

JOSEPH H. BALL
U. S. Senator from Minnesota.

"The authoritarian believes a particular group, whether in government, labor, or business, has a special mission to plan the whole pattern of society and to require all individuals, whether they like it or not, to fit into that pattern."

A. E. BARIT
President, Hudson Motor Car Company.

"Instead of weakening our confidence in the future by the continued warnings of an 'inevitable bust,' the effort should be to encourage a cycle of work, production, and spending by emphasizing the strength of our present condition."

EDITORIAL STATEMENT
Pittsburgh Press.

"One of the most marvelous aspects of this era is the manner in which businessmen persist in trying to expand, and the faith they continue to show in the future, in the face of the troubles that expansion almost invariably creates."

HENRY CABOT LODGE, JR.
Former U. S. Senator from Massachusetts.

"The real task before the government is not so much the indefinite continuation of wage and price policies as it is to put the government's financial house in order. Large-scale production by American management and labor, by eliminating scarcities, will do the rest."

EDITORIAL STATEMENT
The Washington Post.

". . . rail transportation is recognized as being so vital to the general welfare that freight and passenger rates are kept under constant government control. We think that when employers and employees operating a public utility fail to agree, similar power must be exercised over wage rates."

ELIZABETH GURLEY FLYNN
Writing in New Masses.

"There's nothing the matter with our country—except that the people do not own it. It's good to see America, to realize it's a people's prize worth fighting for, and to realize anew that Capitalism is what is wrong with our beautiful country . . . But we are nearer Socialism today than ever before."

BEN F. JENSEN
U. S. Representative from Iowa.

"Six months before Pearl Harbor, the Federal government occupied 68,277,000 square feet of leased floor space throughout the country. On VJ-Day, August, 1945, this total had increased to 227,800,000 square feet. . . . During the ensuing months from August, 1945, to February 20, 1946 . . . only 4,000,000 square feet of this tremendous total have been relinquished, according to newspaper reports."

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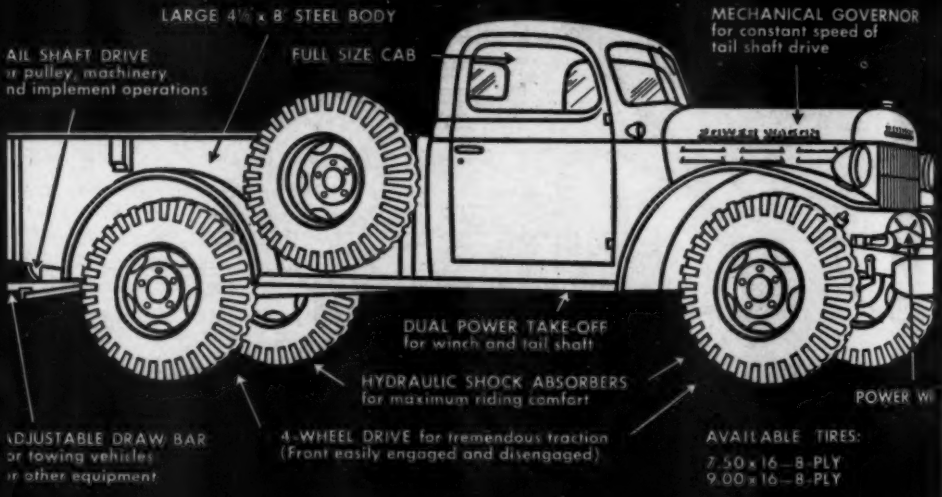

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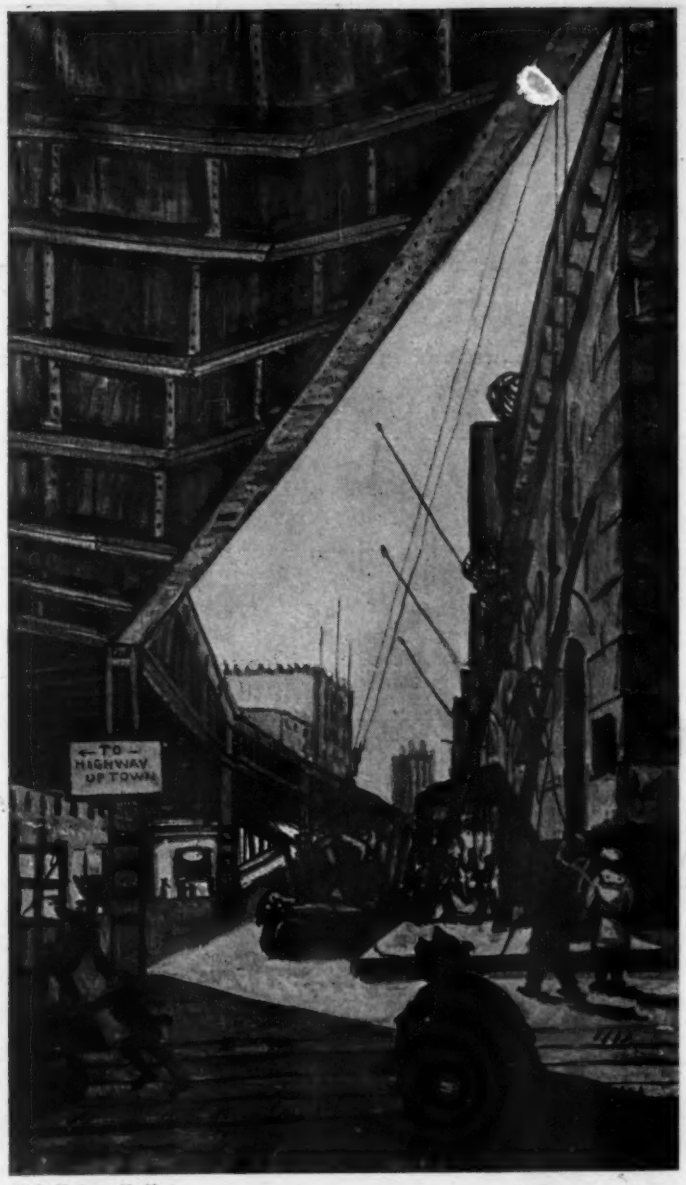
Utilities Almanack

September

26	Th	¶ *New England Gas Association Managers' Conference begins, Boston, Mass., 1946.*
27	F	¶ *Municipal Electric Utilities Association of New York State ends meeting, Elmira, N. Y., 1946.*
28	Sa	¶ *American Water Works Association, Ohio Section, will hold meeting, Oct. 10-12, 1946.*
29	S	¶ *American Water Works Association, Ohio Section, will hold meeting, Oct. 10–12, 1946.*
30	M	¶ *National Electronic Radio and Television Exposition will open, New York, N. Y., Oct. 14, 1946.*

October

1	Tu	¶ *United States Independent Telephone Association will hold annual meeting, Chicago, Ill., Oct. 14–16, 1946.*
2	W	¶ *International Association of Electrical Leagues begins conference, New York, N. Y., 1946.*
3	Th	¶ *American Water Works Association, New York Section, begins meeting, Albany, N. Y., 1946.*
4	F	¶ *Midwest Gas Association and Iowa State College Gas School and Conference will be held, Ames, Iowa, Oct. 28–30, 1946.*
5	Sa	¶ *National Electronic Conference ends, Chicago, Ill., 1946.*
6	S	¶ *American Bar Association will hold annual meeting, Atlantic City, N. J., Oct. 28–Nov. 1, 1946.*
7	M	¶ *American Gas Association begins annual convention, Atlantic City, N. J., 1946*
8	Tu	¶ *National Electrical Manufacturers Association will hold annual meeting, Atlantic City, N. J., Oct. 28–Nov. 1, 1946.*
9	W	¶ *National Reclamation Association begins meeting, Omaha, Neb., 1946.*



Elsie Hafner, N. Y.

"The Elevated Highway"
By *Frederick K. Detwiller*

Public Utilities
FORTNIGHTLY

VOL. XXXVIII, No. 7 SEPTEMBER 26, 1946

Impact of Labor Disturbances on Public Utilities

Since capital invested in public utility enterprises is subjected in the public interest to more rigid regulation than capital employed in nonutility business, there is, in the opinion of the author, no reason why utility employees should not be subject to comparable restrictions, including prohibition of strikes and interruptions of essential services.

BY LUTHER R. NASH*

THE over-all results of the actual and threatened strikes which have been upsetting our national economy since VJ-Day cannot be measured in dollars. With the present relaxation of these disturbances it is possible to apply some yardsticks to the direct effects on the industries involved. Since August of last year more than 3,200 strikes have occurred. During the first five months of this year lost time from strikes amounted to more than 80,000,000 man-days, more than double that of the entire year 1945. At an average rate of $8 per day this means a direct wage loss of $640,000,000. In the 113-day General Motors strike alone the wage loss was in excess of $125,000,000. Indirect wage losses due to enforced shutdown of supplier plants and distributing agencies and curtailments in commercial and other establishments affected by idleness cannot be accurately estimated although probably more than $1,000,000,000.

The loss in volume of gross business incurred by the automobile and other

* Consulting engineer of Ridgefield, Connecticut. For personal note, see "Pages with the Editors."

struck industries was much higher than the wage losses and has radically disturbed the reconversion program. The steel industry lost more than 11,000,000 tons of output as the result of its prolonged strike, and the bituminous coal mines lost 115,000,000 tons of production which cannot promptly be restored. Both these losses, like many others, caused curtailment in production of many commodities for which there is crying need.

THE writer recalls the time, many years ago, when labor was commonly available at $1 per day. Some of the recent *increases* have been double that amount. A word may be appropriate about the yardsticks by which some of these recent increases were measured and which became the pattern for subsequent increases. Two basic assumptions were made by government officials who were concerned in the negotiations:

> (1) that unemployment was imminent as the result of the ending of war production, perhaps to the extent of 8,000,000 men; (2) that the profits of industry were sufficient to absorb additional labor costs to the extent of present demands and more when full quantity production was again reached.

Both these assumptions have been found to be drastically in error. In December total unemployment was less than 2,000,000 or materially less than the normal amount. The delusion of excessive profits was also disproved, as evidenced by authorized increases in steel and automobile prices, found by factual analysis to be necessary. It was not until after the 18½-cent increase in hourly wages had become effectively standardized that there was official admission that the data on which such increases had been based, which came from labor sources, were erroneous. In the absence of reliance on such errors the new wage levels might have been substantially lower and the economic upheaval correspondingly reduced.

THESE recent wage increases have abandoned the cost-of-living basis which prevailed earlier with success, apparently because that basis would no longer satisfy labor. Also, the proposed "ability to pay" basis was early abandoned because its counterpart "inability to pay" was unpalatable to the proponents. Since prewar days wage increases have averaged about 50 per cent for industry as a whole. The official cost of living increase has been slightly more than 30 per cent. Even with allowance for black market prices and deterioration in quality of certain products, there is still a material increase in income over outgo, with a continued scarcity of goods for which to spend it.

After this preliminary, general review of recent labor history, it is in order to take up the real purpose of this article, the impact of wage and other increases on public utilities, and the probable future effects on their operations and finances. Wage increases, based on present levels, average about 30 per cent above prewar—materially less than the industrial average because of higher initial levels, exceptionally stable employment, less radical influences among employees, and exceptionally low earlier rates in certain industries such as prevailed in textiles and agriculture where rates have more than doubled. Unionization has progressed, but there have been relatively

few strikes, largely because of settlements consistent with those granted elsewhere and the general feeling that public utility service should not be interrupted.

WHILE strikes have not been wholly avoided their results have not been disastrous. The public is familiar with reports of partial interruptions of electric power service in certain areas, complete interruption of certain classes or areas of telephone service, many stoppages of local transportation, and the 10-day shutdown of the far-flung Western Union system. A threatened suspension of gas service which might have had very serious consequences was narrowly averted. A threatened widespread strike of electric power employees in Virginia was met by a proposal of the state's governor to impress any strikers into military service. Such unprecedented action was avoided by a settlement, and threatened legal complications were averted.

The feeling that utility strikes which would endanger the public health and safety should not be permitted was illustrated at the annual convention of state governors recently held at Oklahoma City. A resolution endorsing state and Federal laws to prevent such strikes was adopted without opposition. A recent Gallup poll also showed an increasing majority in favor of such legislation. There also has been much heated discussion over the rights of municipal utility employees to organize. The results so far range from definite refusal to recognize any union, through informal discussions with organized groups, to full recognitions of unions and formal contracts therewith. The latter are relatively few, with a trend toward a prohibition of strikes.

LABOR'S protest against such curtailment of its "inalienable rights" to strike fails to recognize certain peculiarities inherent in public utilities aside from the essential character of their service. They are under regulation which fixes their rates, the extent and character of their service, and the extent of their earnings on a rate base which is now commonly limited to the actual dollars invested in their properties, regardless of changes in construction cost levels. These and other restrictions must be accepted by anyone who elects to invest in such industries. If they are not satisfied with such restrictions, which are assumed to be in the public interest, they are free to give up or avoid such investments and seek other, freer fields for their funds. Management practices are also closely regulated and lack many freedoms which other industries enjoy. They cannot abandon service areas without specific approval.

¶ "THE *loss in volume of gross business incurred by the automobile and other struck industries was much higher than the wage losses and has radically disturbed the reconversion program. The steel industry lost more than 11,000,000 tons of output as the result of its prolonged strike, and the bituminous coal mines lost 115,000,000 tons of production which cannot promptly be restored.*"

There is no logical reason why utility employees should not be subject to comparable restrictions, including the prohibition of strikes and interruption of essential service. If they do not like such restricted employment they are free, like other groups concerned with the industry, to seek employment elsewhere. Disputes of other kinds are referred without question to the courts for settlement and their final findings are accepted as being consistent with reasonable personal liberties. More than forty years ago Mackenzie King, then Canada's Deputy Minister of Labor, made the statement during a disastrous fuel strike that "private rights end when they become public wrongs." The truth of that statement still holds.

ASSUMING that the general labor situation is stabilized for the time being, the question arises as to what has been its effect on the utility picture. Utilities are well known to have an exceptionally high investment in relation to their volume of business. A fully equipped, typical company has $5 invested for each dollar of annual revenue, as compared with less than one dollar in the average industrial plant. The electric power industry investment per normal employee is about $50,000 as compared with a small fraction of that amount for the average industry (estimated at about $9,000).

The labor part of its total costs, assumed to be equal to its revenue, are, therefore, low, the total exclusive of salaried employees being about 12 per cent. In lightly mechanized industries this percentage is several times as high. Even in the steel industry payrolls take 40 per cent, eight times a normal year's dividends. Using the above percentages of wage increases since 1939 and applying them to the labor percentage in total costs, it appears that the result is to increase such costs by less than 4 per cent. The greater part of these increases are of recent origin and are not yet fully reflected in published income statements.

Another important factor in utility costs is fuel. Since 1939 its cost for the average power company has risen from 21 cents per kilowatt hour to 29 cents, an increase of 38 per cent in spite of gains in production efficiency. The average cost of fuel in the electric power industry is about 13 per cent of the total cost of service, varying with the availability and reliability of hydro power.

THE further increase in cost of coal, resulting from the recent strike which nearly exhausted the stock-piles of the industry, and not reflected in the above figures, will add an estimated average of 40.5 cents per ton on all coal at the mines. This increase covers an 18½-cent wage increase plus welfare and other benefits amounting to at least 5 cents per ton. Utility increases may be somewhat less than the average but increased freight rates will add another 10 cents per ton. Similar increases are not now applicable to fuel oil and natural gas which, together with water power, serve nearly one-half of the total utility power supply. The further recent increase in fuel costs may, therefore, add another 5 per cent to the average total cost of service. The costs of other supplies for operation and maintenance have also increased substantially but their effects on over-all costs are relatively small. Edison Electric Institute has estimated that the in-

Resolution against Utility Strikes

"THE feeling that utility strikes which would endanger the public health and safety should not be permitted was illustrated at the annual convention of state governors recently held at Oklahoma City. A resolution endorsing state and Federal laws to prevent such strikes was adopted without opposition."

creases in wages and fuel of United States electric power companies in the coming twelve months, in addition to earlier increases, will amount to about $100,000,000, or 3 per cent of expected revenue.

Fortunately these increases in operating costs do not tell the whole story with respect to future net income for there have been substantial offsets. Excess profits taxes (for a regulated industry that is assumed to have no such profits) disappeared at the end of 1945. In that year they accounted for more than one-quarter of total taxes which, in turn, were 22 per cent of total revenues. The incidence of excess profits was quite irregular, limited largely to areas of heavy war industries. Carry backs and other tax adjustments had material effects on the 1945 showing and some of them will also appear in 1946. The basic income tax rate, applicable to all utilities, was also reduced to 38 per cent.

A FURTHER important saving has been made and is still in progress; namely, reduction in debt service through refinancing. The drastic reduction in interest rates on government war borrowings to unprecedentedly low levels has led to similar reductions in rates for private investments, both debts and equities. Bonds of well-managed and stable utilities are now selling to yield from 2.75 per cent to 2.50 per cent as compared with about 4 per cent only a few years ago, with large bank loans at materially lower rates. And preferred stock yields are also down to or below the bond levels

of that time. This has led to the general calling of high-rate older issues and the recalling of some of the fairly recent issues to bring about still greater interest savings. This process has been encouraged by regulatory authorities in the interests of lower rates for service. The New York commission has been particularly critical of apparent dilatoriness in taking advantage of conversion savings.

The savings made and to be made in the utility field by such means can be estimated only approximately. In 1945 electric power companies reduced their actual interest charges by $19,500,000 with only slight changes in outstanding debt. Such savings, together with preferred dividend reductions, may be duplicated in 1946, aside from tax and other adjustments incident thereto. This would be nearly 10 per cent of total long-term debt interest. With coupon or dividend rates reduced by an average of 15 per cent or more for each refinancing or re-refinancing, it appears that such operations should be completed in the not distant future in the absence of continued reduction in "easy money" rates. There are indications that the present all-time low will not be materially reduced.

If the cumulative effects of refinancing in recent years amount to a one point reduction in the coupon rate, the total interest reduction on the $6,000,000,000 outstanding long-term debt of electric power companies would amount to $60,000,000. Because of smaller and some noncallable issues, the amount of preferred dividend reductions is comparatively small in spite of yields now approaching 3.5 per cent. Others have had similar experiences.

Such savings, shared by all debtors, are not without their drawbacks. Through reduction in national and other public debt interest rates in order to curtail taxes, incomes of taxpayers from other investments as well as public utilities have been radically reduced. Many persons and institutions have no other sources of income and have also suffered from higher costs of living. Among the many institutions so affected are the life insurance companies, policies of which in some form are to be found in most of our homes, protecting 60,000,000 to 70,000,000 people (to be compared with about 36,000,000 taxpayers). The reduction in yields on insurance investments, which furnish a large part of distributable income, has already led to an increase of about one-sixth in insurance costs, reflected largely in curtailed premium credits.

Presumably most of the residential customers of the utilities are beneficiaries of life insurance, including 28,000,000 electric, 20,000,000 gas, 16,000,000 telephone, not to mention other classes of utilities and customers. Whether or not their savings in utility service bills through reduced interest charges are offset by such insurance and other similar increases is not yet clear. It is clear, however, that there are serious losses to many people in all walks of life. The well known Carnegie Corporation reports that since 1928 its endowment income has declined 40 per cent, requiring many curtailments or cancellations of its benefactions.

The practice of providing pensions to utility employees when retirement age is reached has become quite general. Many such plans are administered

by insurance or other professional organizations. They report that the cost of providing a particular retirement annuity has increased 28 per cent since interest rates began to decline. Most of these retirement plans are financed wholly by the employers, which adds a minor amount to cost of operation.

The above picture of recent gains and losses in the utility field is necessarily a general one and individual companies are affected in widely varying degrees. Some have hydro power supply and are not worried about fuel costs and relatively little about labor; others have not paid excess profits taxes or had other important tax relief; still others have made or expect to make reasonable long-term settlements of labor matters.

For the future, most companies, particularly in the electric power field, may expect large increases in the demands for their service, particularly in the residential and commercial fields. There may be disappointing delays in obtaining appliances for which the pent-up demand is enormous, partly due to continued shortages of copper because of prolonged strikes. This is particularly true of fractional horsepower motors, used in so many appliances, for which 35,000,000 are in demand, with a current monthly supply of only 1,500,000. It has been estimated that an average of 1,000,000 new homes will be needed during each of the coming five years, all requiring utility service.

The sharp curtailment in production at the end of active military operations is gradually being offset by more profitable new and converted activities. Such new business can be handled without proportional increases in operating costs. Returning war veterans are proving helpful in restoring efficiency, impaired by overwork of curtailed staffs and inexperienced recruits.

It is the general experience of industry that wage increases lead to studies of more extended use of labor-saving equipment through which production costs can be maintained or reduced. This means curtailment of labor forces unless output can be increased. With the exception of the telephone industry, in which extension of machine switching can displace many operators, and the labor economy of larger power and other units, the opportunities for such savings in the utility field are limited.

The past striking increases in power production efficiency cannot be continued with present types of equipment because of approach to theoretical thermal limits. As to atomic

¶ "The *practice of providing pensions to utility employees when retirement age is reached has become quite general. Many such plans are administered by insurance or other professional organizations. They report that the cost of providing a particular retirement annuity has increased 28 per cent since interest rates began to decline. Most of these retirement plans are financed wholly by the employers, which adds a minor amount to their cost of operation.*"

power, the optimism of a contributor to the June 6, 1946, issue of the FORTNIGHTLY is not shared by the experts who have been closer to the recent scientific developments, particularly with reference to the use of lighter fissionable material, not heretofore used or discussed, which would avoid the risks of radioactivity and costs of heavy shielding. It is, however, expected that atomic research in the industrial field will be actively continued and that, within a few years, steam production in large stationary plants will be possible with material reduction in costs.

Increases in labor costs are and will continue to be an important factor in costs of new equipment and construction. Up to the present time utility construction costs have increased about 40 per cent over the prewar levels and these increases will continue as manufacturers, their suppliers, and the producers of raw materials gradually adjust their wage scales to the new standards. In final analysis, other than for royalties or their equivalent, the cost of everything we buy is represented by labor.

As investment increases with new or replaced equipment, utilities under regulation are entitled to increases in revenue to cover their added carrying charges. Presumably needed rate increases will be obtainable when added costs are not balanced by savings, although probably with delays, unless the added freedom in regulatory procedure authorized by our Supreme Court adds ultimate complications rather than the intended simplification. There have thus far been few indications that such complications will be serious. A practically unbroken record of continuous electric rate reduction will not be lightly broken if it can be avoided.

THE foregoing review of the utility situation as affected by recent labor and other developments discloses a rather limited final effect as compared with other industries, with possibilities of expansion and improvements that should permit continued financial stability. Too much reliance on the trends shown in current financial statements should be avoided because of the many changes in taxes and adjustments for amortization and other nonrecurring items.

The temptation comes in closing to digress with some comments on the economics involved in some of the recent strikes. The General Motors strike may be used as an illustration. Lasting 113 days, it involved 175,000 men and lost wages amounting to $125,000,000. The original wage demand was for 30 per cent increase. The final settlement was for about 16 per cent, one cent less than was personally recommended by President Truman who took part in the negotiations. The strike could have been avoided by a wage rate about 5 cents lower than was finally accepted. It could have been settled on the final terms one month before it actually ended. The average direct loss per worker during the strike was about $715. The possible gain per year for the average worker from the final settlement without overtime over that obtainable without strike was about $100.

This means that it would take seven years of full-time work to make up the actual strike loss. Full-time operation rarely continues without interruption for seven years.

Increases in Labor Costs

"INCREASES in labor costs are and will continue to be an important factor in costs of new equipment and construction. Up to the present time utility construction costs have increased about 40 per cent over the prewar levels and these increases will continue as manufacturers, their suppliers, and the producers of raw materials gradually adjust their wage scales to the new standards. In final analysis, other than for royalties or their equivalent, the cost of everything we buy is represented by labor."

THE coal strike could have been avoided by agreement on the 18½-cent wage increase finally adopted, the only gain from the two months' loss in pay at $1.27 per hour being the finally adopted, jointly administered, welfare fund. The steel, electrical, and other important strikes which yielded similar hourly gains did not last as long but it is difficult to see how any of them were beneficial to the participants in the long run in the absence of further successful efforts without similar costs. Further strikes are not only possible but are contemplated in some of the recent settlements. Some of them will affect public utilities directly or indirectly, but it is obvious that some more economical method of settlement is badly needed, one that leaves less antagonism in its wake and is based on sound factual analyses.

A disturbing factor in the labor situation is the keen competition for membership and prestige which exists between the two major union groups, between crafts on jurisdictional grounds, and between individual leaders who fear the loss of their jobs if they do not negotiate improvements in wages and working conditions satisfactory to their followers and more than other unions have gained. There is lack of clear realization that only about one-quarter of all workers and only 10 per cent of our total population belong to these major union groups. The remainder of the workers and population have to pay unreasonably higher prices for goods to the extent that union wages are exorbitant or discriminatory.

THE real worth of labor, which is all that it can command in the long run, is measured by what it produces.

Labor's habit of demanding more pay for less work is economically unsound beyond the point of increased efficiency and a share in the net advantages of increased machine production. The time may come when certain classes of high-paid labor will find that they have priced themselves out of their jobs because their less prosperous fellows cannot or will not afford to buy their products. Fortunately, this should not be true in the public utility field.

The solution of the present acute labor problem is not yet in sight. The Case Bill, vetoed by President Truman, would have provided a much needed equalization between labor and management of their several privileges and responsibilities, particularly the latter. Immunity from the restraints commonly imposed by law upon personal and corporate conduct encourages contempt for law and leads to dictation. Only when our Congress has succeeded in its recent efforts to amend the Wagner Law with its still more discriminatory amendments will an equitable and stable foundation be laid for peaceful labor relations. That the Wagner Law failed in its professed intention to bring about industrial peace is evidenced by the fact that during the first ten years of its operation the number of men involved in work stoppages was three times that in the preceding similar period.

THERE are reasons for thinking that the widespread public criticism of the ruthless conduct of certain labor leaders may have some effect on labor policies and responsibilities. This is indicated by an article in a recent issue of the official organ of the American Federation of Labor, from which the following brief extracts are quoted:

> A broken contract is the mark of bad faith and irresponsibility.
>
> Remember that three groups—workers, consumers, and management—should share the wealth created by American industry. . . . Industry's profits should bring (1) wage increases; (2) price reductions; (3) reward for management as an incentive to improve production. . . . You cannot expect all the profit to go into wage increases.
>
> Work to improve production per man-hour so that there will be more income to share.

If such sentiments, not yet duplicated by other labor groups, were generally approved and acted upon, our labor troubles would soon be over. One noteworthy feature in the above quotation is its recognition of the third interested, but often ignored, party in labor negotiations (which should not be called controversies), the customer group. It many times outnumbers the labor group and is capable of expressing itself by buyers' strikes and the ballot.

The investor group, included in the above quotations under the "management" head, also deserves a word of comment. A recent survey of ten of our large corporations shows that their stockholders outnumber their workers by 50 per cent. They also have votes and, although they have been far from vociferous, are becoming organized. They also have the privilege of striking if they are not satisfied with their wages and can put their money (the product of past labor) at work elsewhere or leave it temporarily unemployed. If this should happen, needed new or improved machinery would not be provided and direct labor would be curtailed, or idle, because of inefficient production. Such is the law of economics, effective in the long run in a free enterprise system.

IMPACT OF LABOR DISTURBANCES ON PUBLIC UTILITIES

As this is being written the suspension, presumably temporarily, of all price controls is causing much confusion. The series of drastic wage increases, supported by our government, has necessarily increased the production cost of most commodities. OPA, while in power, zealously restricted price increases in an effort to avoid inflation until profitable operation was impossible. Production of some goods was suspended to avoid actual losses. Such curtailed production increases the danger of inflation. Uncontrolled price increases would mean another wave of wage increases and the race would be on, with the picture of Germany in the twenties and China and other war-torn countries at present in front of us. It is to be expected that voluntary or partially restored government control will avoid any such disaster.

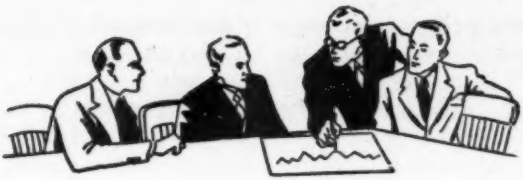
Clearly, the possible extremes of inflation will not hit the utilities. Customers can be assured that, under regulation, increases in rates will be limited to those needed to cover actual increased costs and provide financial stability. There can be no gouging such as may be possible in unregulated industries. The electric power industry has a pardonable pride in its record of continued reduction in the costs of its service, throughout the war period as well as earlier. Since 1939 the average rates per kilowatt hour for residential service have declined from 4 cents to about 3.3 cents, a reduction of 17.5 per cent.

During the same period the cost of living increased more than 30 per cent. In spite of any further wage and other increases which may occur with their possibly necessary increases in utility rates, it may be assured that the relatively favorable showing of the industry will be continued.

On Unbalancing the Budget

"TODAY we authorize the appropriation of moneys, and then we make the appropriations. True, we have the executive budget, with its estimates for the various agencies and departments, and its estimates of the probable deficit. But there is no responsibility fixed upon members of the House and Senate at any time during the whole course of a session of Congress to take action which will force them in the public eye to justify a measure which exceeds the congressional budget on the ground that it is of sufficient importance that the public debt is to be increased specifically by that amount."

—ROBERT M. LA FOLLETTE, JR.,
U. S. Senator from Wisconsin.



The Depreciation Problem

PART II. *History and Analysis of Conflicting Court And Commission Theories*

Present concepts of the Supreme Court in regard to regulatory laws—contrary to decisions rendered prior to 1941—furnish, in the opinion of the author, much food for thought by the telephone, electric, and gas industries. Are we ready, he asks, for ownership and operation by the government?

BY HENRY EARLE RIGGS*

A THOROUGH study of accounting reserves and of the practice of deducting depreciation in a rate determination over the past hundred years will disclose the following developments:

1. Reserve accounting and the use of the word "depreciation" in connection with it had its beginnings early in the last century. As early as 1850 Harper and Company published a volume entitled *Railway Economy* which contains a chapter discussing the necessity of establishing "sinking funds" for recovering the cost of track which was estimated to wear out in about twenty years. At about the same period Massachusetts and New York passed laws requiring railroads to report the depreciation of rails and equipment. A good many earlier references may be found to "sinking funds" of private manufacturing plants and of marine hulls and boilers. Depreciation as a deduction from value for rate making appears not to have been an issue.

2. In the later years of the Nineteenth Century papers in the technical journals and society proceedings and records of court cases indicate that the waterworks industry was beginning to use reserve accounting and that the young electric industry was recognizing the need of it, but also make it evident that this form of accounting was not generally understood by engineers or utility managers.

3. Valuation of property and the deduction of depreciation from cost or value came into use in the eighties and nineties when waterworks plants were purchased by cities on the expiration of many franchises. There are very few published records of methods used in these cases. The Texas Stock and Bond Law resulted in a number of valuations prior to the turn of the century, but apparently different methods

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were used on different carriers and depreciation was not deducted.

4. The state railroad valuations in Michigan, Wisconsin, Minnesota, Washington, and other states between 1900 and 1910 used "cost of reproduction" of an identical property at prevailing prices, and deducted depreciation determined by inspection of the plant. Only Washington used an estimate of depreciation based on age divided by estimated life, but did not deduct it. Cost of reproduction was the necessary measure of value as accounting was not under regulation, was far from uniform on different carriers, and actual investment in existing plant was impossible to secure.

5. Conditions existing at the beginning of the Federal valuation of railroads in 1913 and 1914 may be summed up approximately as follows as regards valuation and depreciation: Accounting for retirement of plant worn out in service, called "depreciation" for over half a century by accountants, was done by use of some form of sinking-fund or compound interest method in the great majority of cases. Its use had been almost wholly confined to industrial or commercial property. Only a few waterworks plants had used it prior to the turn of the century. The Bell telephone utility began to study seriously accounting reserves about 1906 or 1907 and by 1910 had developed its present system of straight-line, age-life reserves. Government regulation of railroad accounting became effective in 1907, with reserves for maintenance of equipment required, but the method not prescribed. The regulation of telephone and electric utility accounting became effective about 1912 to 1914 just as the Federal valuation was commenced.

The Growth of the Interstate Commerce Commission Theory

THE Valuation Act, passed in 1912, resulted in the appointment of a board of five highly qualified engineers to direct, and the choice by civil service of a large staff of several hundred engineers to do, the field work of valuation. The rules and regulations adopted in 1912, 1913, and 1914 accepted "Cost of Reproduction Less Depreciation" as the measure of value, used prices as of June 30, 1914, for pricing all railroad property, whatever the date of valuation, and adopted the age-life or "straight-line" method of computing depreciation.

The writer became very familiar with the methods of the bureau of valuation as consulting engineer for a dozen or more carriers. The use of one pricing date was wholly proper, as it could be translated to any later date by the use of index numbers. The use of the age-life depreciation estimate (first called "straight-line" about the time of the beginning of the bureau's work) was probably due to the extreme difficulty of supporting at hearings or in litigation the opinion estimates of scores of field engineers. In the hundreds of subsequent hearings on both primary and "recapture" valuations, the major issues were (a) the great difference between the prices of June 30, 1914, and those of valuations made in such years as those from 1917 to 1922 or 1923, and (b) the very great differences, amounting to scores or hundreds of millions of dollars on the large systems, due to deduction of straight-line depreciation.

REFERENCE to this valuation has been stressed because it marked the adoption, by a government commission, of the straight-line method of computing depreciation to be deducted in a valuation. In 1914, the bureau of accounting in the second classification of railroad accounts prescribed the "straight-line" method in the required accounting for equipment and also used the word depreciation in connection with the reserve.

The Federal valuation continued until 1933. The "recapture" provision of the Transportation Act, effective under the law in 1920, did not reach hearings until late in the 1920's. It is to be here emphasized *that not a single railroad case reached the Supreme Court from 1914 to 1933 that called forth any ruling on the subject of depreciation. Those that did reach the court were decided on the cost of reproduction on 1914 prices, not on depreciation.* During this entire 19-year period the commission used the straight-line method in accounting and contended that the credit balance in the reserve must be deducted as depreciation in any valuation proceedings, thus disregarding all opinions of the United States Supreme Court handed down during the period in public utility cases.

Supreme Court Opinions 1909 to 1934

IN 1879 the Supreme Court squarely held that an accounting reserve to care for the retirement or "depreciation" of rails could not be approved.[1] From that time to 1909 there was practically no use of reserve accounting by any utilities except the waterworks industry. In the latter year the Supreme Court reversed its earlier decision, and held that reserves were proper and that the company was entitled to "see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning."[2]

The great increase in prices from 1914 to 1920 and the much higher plateau of prices in the subsequent decade resulted in scores of cases involving the rates of gas, waterworks, street railway, telephone, and electric corporations whose rates are based on a fair return on the value of the property.

Many of these cases reached the Supreme Court during the 1920's and resulted in a series of definite pronouncements on valuation and depreciation which guided accountants and engineers in their work. Among the important principles enunciated were:

(a) Consideration must be given to prices prevailing at the date of valuation;

(b) The testimony of competent engineers who have examined the condition of the property is to be preferred

[1] United States *v.* Kansas P. R. Co. 99 US 455, 25 L ed 289.

[2] Knoxville *v.* Knoxville Water Co. (1909) 212 US 1, 13, 53 L ed 371.

¶ "THE *use of the age-life depreciation estimate (first called 'straight-line' about the time of the beginning of the [Federal-valuation-of-railroads] bureau's work) was probably due to the extreme difficulty of supporting at hearings or in litigation the opinion estimates of scores of field engineers.*"

over estimates of depreciation based on age and probable life of the property;

(c) Property reflected by credit balances in reserves which were created by appropriations of earnings from service rendered belongs to the company just as much as that paid for from proceeds of stocks or bonds.[3]

Thus during the period from 1914 to 1933, while the Interstate Commerce Commission was using the straight-line method in valuation and accounting, and was strenuously arguing that its use in accounting was sound and that the credit balance in the reserve measured loss of value to be deducted, the United States Supreme Court was deciding case after case on a wholly different and directly opposing theory.

The Important Cases

BEFORE discussing more recent cases special emphasis may properly be laid on two cases decided by the Supreme Court before its reorganization, the "New Jersey Telephone Case"[4] and Lindheimer *v.* Illinois Bell Teleph. Co.[5]

The "New Jersey Telephone Case" held in 1926 that "customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. . . . Property paid for out of moneys received for service belongs to the company just as does that purchased out of the proceeds of its bonds and stock." The Smith Case and the Lindheimer Case, which was a second appeal to the Supreme Court of the same controversy discussed in the Smith Case, both recognized this ownership of money or property reflected by the credit balance.

Mr. Chief Justice Hughes said in the Smith Case:

> While it has been held by this court that property paid for out of moneys received for past services belongs to the company, and that the property represented by the credit balance in the reserve for depreciation cannot be used to support the imposition of a confiscatory rate (271 US 23, PUR 1926C 740), it is evident that past experience is an indication of the company's requirements for the future. The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive. (282 US 133, 158, PUR 1931A 1, 12.)

THE final summation of these years of ruling on questions involving depreciation — both the accounting concept and the engineering concept of deduction in valuation—is found in the Lindheimer Case, *supra,* opinion by Mr. Chief Justice Hughes. That long and consistent opinion calls for the careful study of every paragraph in it. It does not involve the controversial question of "fair value." It emphasizes the fact that charges to operating expense may be as important as valuation. "Thus excessive charges of $1,500,000 to operating expenses would be the equivalent of 6 per cent on $25,000,000 in a rate base."

It again referred to ownership of property reflected by the "depreciation" reserve, saying "we adverted to this question on the former appeal. (The

[3] Louisiana R. Commission *v.* Cumberland Teleph. & Teleg. Co. (1909) 212 US 414, 53 L ed 577; Nashville, C. & St. L. R. Co. *v.* United States (1920) 269 Fed 351; affd. (1921) 255 US 569, 65 L ed 790; New York & Q. Gas Co. *v.* Newton, PUR 1921A 530, 269 Fed 277; affd. (1922) 258 US 178, 66 L ed 549; Pacific Gas & E. Co. *v.* San Francisco, 265 US 403, PUR 1924D 817; McCardle *v.* Indianapolis Water Co. 272 US 400, PUR 1927A 15; Public Utility Comrs. *v.* New York Teleph. Co. 271 US 23, PUR 1926C 740; Smith *v.* Illinois Bell Teleph. Co. 282 US 133, PUR 1931A 1.

[4] 271 US 23, PUR 1926C 740.

[5] (1934) 292 US 151, 3 PUR(NS) 337.

The ICC and the Supreme Court

". . . during the period from 1914 to 1933, while the Interstate Commerce Commission was using the straight-line method in valuation and accounting, and was strenuously arguing that its use in accounting was sound and that the credit balance in the reserve measured loss of value to be deducted, the United States Supreme Court was deciding case after case on a wholly different and directly opposing theory."

Smith Case.) We said that recognition of the ownership of the property represented by the depreciation reserve did not justify the continuance of excessive charges to operating expenses." (3 PUR(NS) at page 346.) It held that "the experience of the Illinois Company . . . should afford a sound basis for judgment as to the amount which, in fairness both to public and private interest, should be allowed as an annual charge (for depreciation)." (PUR 1931A at page 13.) It held that, "In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered." (3 PUR(NS) at page 347.)

It then proceeds to discuss the straight-line method at length and points out that "the calculations are mathematical but the predictions underlying them are essentially matters of opinion," and goes on to say "the predictions must meet the controlling test of experience. In this instance the evidence of expert computations of the amounts required for annual allowances does not stand alone. In striking contrast is the proof of the actual condition of the plant as maintained."

The company based its estimate of depreciation to be deducted on the testimony of witnesses who inspected the physical plant and made studies of maintenance. On this subject the court said:

> In the light of the evidence as to the expenditures for current maintenance and the proved condition of the property—in the face of the disparity between the actual extent of depreciation, as ascertained according to the comprehensive standards used by the company's witnesses, and the amount of the depreciation reserve—it cannot be said that the company has established that the reserve merely represents the consumption of capital in the service rendered. Rather it appears that the depreciation reserve to a large extent represents provision for capital addi-

tions, over and above the amount required to cover capital consumption. This excess in the balance of the reserve account has been built up by excessive annual allowances for depreciation charged to operating expenses. (3 PUR(NS) at page 351.)

Court and Commission Theories Are Conflicting

THE foregoing skeleton outline of the history of the theories of depreciation shows that

1. Accounting reserves for retirement of plant of private industry trace back more than one hundred years, that early reserves were generally created by some form of interest method, and that they were little understood at the turn of the century.
2. Valuation of property on an extensive scale commenced about the year 1900 and in the first decade of the century the theory of cost of reproduction less depreciation as a rate base was established and depreciation was determined by inspection.
3. The Interstate Commerce Commission valuation of railroads adopted cost of reproduction less depreciation as a measure of value, but used the straight-line or age-life method of computing depreciation. This work continued without interruption until 1933 and no case reached the courts in which depreciation methods were passed upon. Therefore the commission still uses its old methods and clings to its theory.
4. During the same period many public utility rate cases were tried and reached the Supreme Court. These resulted in a line of opinions in direct conflict with the theories of the commission.

Supreme Court Opinions in the 1940's

BEGINNING in August, 1937, with the appointment of Mr. Justice Black the membership of the Supreme Court was almost completely changed by 1941 and new concepts have been adopted by the reorganized court. Two opinions of the Supreme Court laid the foundation for this radical change in the law. These two cases, and the third case,[6] quoted at length, affirmed by the Supreme Court, deal with industries which have only recently come under regulation by the Federal Power Commission.

The opinions, however, cannot be construed as being limited to the natural gas and pipe-line industries. They "start a new chapter in the regulation of utility rates."

Federal Power Commission *v.* Natural Gas Pipeline Co.[7] was decided in March, 1942. Mr. Chief Justice Stone delivered the opinion; Mr. Justice Black filed a concurring opinion in which Mr. Justice Douglas and Mr. Justice Murphy concurred. Mr. Justice Frankfurter also filed a concurring opinion.

The paragraph in Chief Justice Stone's opinion to which attention is particularly directed reads as follows:

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made, and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

IN the concurring opinion of Justice Black, which was concurred in by Justices Douglas and Murphy, language is found which needs to be here quoted before referring to the Hope Case:

[6] 54 PUR(NS) 1, 142 F2d 943.
[7] 315 US 575, 42 PUR(NS) 129, 138, 147.

We have here, to be sure, a statute which expressly provides for judicial review. Congress has provided in § 5 of the Natural Gas Act, 15 USCA § 717d, that the rates fixed by the commission shall be "just and reasonable." The provision for judicial review states that the "finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive." Section 19(b), 15 USCA § 717r(b). But we are not satisfied that the opinion of the court properly delimits the scope of that review under this act. Furthermore, since this case starts a new chapter in the regulation of utility rates, we think it important to indicate more explicitly than has been done the freedom which the commission has both under the Constitution and under this new statute. While the opinion of the court erases much which has been written in rate cases during the last half century, we think this is an appropriate occasion to lay the ghost of Smyth *v.* Ames (1898) 169 US 466, 42 L ed 819, 18 S Ct 418, which has haunted utility regulation since 1898. That is especially desirable lest the reference by the majority to "constitutional requirements" and to "the limits of due process" be deemed to perpetuate the fallacious "fair-value" theory of rate making in the limited judicial review provided by the act.

• • •

As we read the opinion of the court, the commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of "fair value." The commission may now adopt, if it chooses, prudent investment as a rate base—the base long advocated by Mr. Justice Brandeis. And for the reasons stated by Mr. Justice Brandeis in the Southwestern Bell Telephone Case (262 US 276, PUR 1923C 193) there could be no constitutional objection if the commission adhered to that formula and rejected all others.

THIS opinion was followed by Federal Power Commission *v.* Hope Nat. Gas Co.,[8] on January 3, 1944. Mr. Justice Douglas delivered the opinion of the court. Mr. Justice Black and Mr. Justice Murphy concurred. Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Jackson filed dissenting opinions. The facts in this case are so utterly different from those of any corporation that has long been under regulation that there is no need here to quote extensively from the opinion. It follows the reasoning of the concurring opinion in the Pipeline Case. It clearly reverses the fair value theory of valuation. The full effect of these two cases on the subject of depreciation is yet to be determined.

Colorado Interstate Gas Co. *v.* Federal Power Commission,[9] decided by the U. S. Circuit Court of Appeals, tenth Circuit, on May 16, 1944, affirmed by the U. S. Supreme Court,[10] emphasizes the effect of the paragraph quoted from the opinion of Mr. Chief Justice Stone in the Pipeline Case and the references to the subject in the Hope Case. The following two quotations indicate that the old 1909-1934 court-made law is a thing of the past.

UNDER the question of value, the court said that the commission determined original cost, deducted for depreciation, depletion, and amortization, and added working capital and additions to plant. It stated that the companies contended for present fair values and cited the cases they depended upon. Then the following statement was made:

[8] 320 US 591, 51 PUR(NS) 193.

[9] 54 PUR(NS) 1, 16, 21, 142 F 2d 943.
[10] (1945) 324 US 581, 58 PUR(NS) 65.

¶ *" . . . not a single railroad case reached the Supreme Court from 1914 to 1933 that called forth any ruling on the subject of depreciation. Those that did reach the court were decided on the cost of reproduction on 1914 prices, not on depreciation."*

But the late case of Federal Power Commission *v.* Natural Gas Pipeline Co. *supra* (315 US 575, 586, 42 PUR(NS) 129, 138) involved an order of the commission reducing the rates of two companies engaged in business as a single enterprise in the production and transportation interstate of natural gas for sale at wholesale to public utilities, and the court there held that the "Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made, and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end." And the later case of Federal Power Commission *v.* Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR(NS) 193, 200, similarly involved an order of the commission requiring a reduction in rates of a company engaged in the business of producing, purchasing, transporting, and selling at the state line natural gas for continuous movement and ultimate distribution in other states. There the rate base adopted by the commission was substantially identical with that here; and there, as here, it was attacked on the ground that present fair value is the only permissible rate base. But the court rejected the contention and upheld the order. In doing so, the court said that, "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." These two cases are controlling. And guided by them, it is clear that neither of these orders is to be invalidated for failure of the commission to use present fair value as the rate base, unless in its totality it oversteps the limits of due process.

CLAIMS for going concern value were disallowed. The subject of allocation of cost of service was discussed by stating the commission's action and the company's claim, and the subject was summarily dismissed as follows:

> Therefore the orders are not open to further judicial inquiry on these grounds. Federal Power Commission *v.* Natural Gas Pipeline Co. (1942) 315 US 575, 42 PUR(NS) 129; Federal Power Commission *v.* Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR(NS) 193.
>
> *Depletion, Depreciation, and Amortization*—The companies introduced evidence relating to accrued depreciation. It was based upon observed per cent condition of the property. Accrued depletion as determined by Canadian was based on estimates of original and remaining gas reserves. The evidence of the staff of the commission treated accrued and annual allowances for depreciation on the basis of the application of the service-life principle. The commission observed that if the theory of observed per cent condition of the property were carried out consistently, it might be considered as having some elements of reasonableness; that the small observed depreciation would find its counterpart in an equivalently small annual charge to operating expenses to cover the yearly added amount of observed depreciation; *that this was not done in the estimates submitted by these companies; that, instead, in calculating expenses chargeable to the consumer high depreciation charges were computed, and in computing return to the company a small deduction from the cost of plant was computed. And after full consideration, the commission adopted the service-life principle for determining annual and accrued depreciation and the production method for determining annual and accrued depletion of production facilities.*
>
> . . .
>
> Once more, in the absence of impingement upon due process, review is ended. Federal Power Commission *v.* Natural Gas Pipeline Co. *supra;* Federal Power Commission *v.* Hope Nat. Gas Co. *supra.* [Italics supplied.]

Certiorari to review the affirmance of the rate order of the commission was granted[11] and the opinion of the circuit court of appeals was in all things affirmed by the Supreme Court.[12] There is no need to discuss further this case. The story it tells is perfectly plain. And it is "in all things affirmed."

[11] Colorado Interstate Gas Co. *v.* Federal Power Commission (1945) 323 US 807, 89 L ed 644.

[12] Colorado Interstate Gas Co. *v.* Federal Power Commission (1945) 324 US 581, 58 PUR(NS) 65.

Importance of Changes to Operation

"THE final summation of . . . years of ruling on questions involving depreciation—both the accounting concept and the engineering concept of deduction in valuation—is found in the Lindheimer Case. . . . That long and consistent opinion calls for the careful study of every paragraph in it. It does not involve the controversial question of 'fair value.' It emphasizes the fact that charges to operating expense may be as important as valuation."

Dean Pound's Comment

IN a special issue of the *New York Journal of Commerce* on the subject of valuation published in July, 1943, Dean Roscoe Pound presented a paper which is well worth most careful consideration by utility managements. This was written about a year after the Pipeline Case, but long before either the Hope Gas Case or the Colorado Interstate Gas Case:

> Administrative Action or Law? There have come to the fore recently ideas of making over the special and economic structure through administrative action in place of maintaining it through law. There has been a rapid development of administrative agencies of every kind, a growing tendency to commit undifferentiated powers to them, a tendency on their part to exercise powers beyond what are assigned to the executive in our polity, and an increasing advocacy of administrative absolutism, not only by administrative officials, but by teachers of jurisprudence and politics. Along with this development has gone a strong tendency to take away judicial review of administrative action, so far as the courts could be induced to give it up, and, where it was not constitutionally possible to eliminate it, to cut down such review to the inevitable minimum or so hamper and limit it that it was not worth seeking and the helpless individual could be coerced into such arrangement as the administrative agency might choose to concede.
>
> All this is a giving up of what had been the characteristic American polity and a reversion to the ideas of the age of absolute governments in the Seventeenth and Eighteenth centuries.

. . .

Utility Valuation an Example

Valuation of public utilities affords an excellent illustration of what committing such a subject to administrative determination free from judicial review would mean.

Administration characteristically treats each case and each situation as unique. But the economic order calls for predictability and uniformity. Except as relations are adjusted and conduct is regulated by systematic application of authoritative rules and principles in accordance with an authoritative technique—in other words, by courts according to law—nothing can be done with assurance which involves any large investment or expenditure of money or labor or which extends over any long time. *As utilities depend upon the rates they may charge and those rates depend upon valuation, a polity which puts valuation at large as something not predictable by reference to principles of general application, but left to be arrived at as a unique determination for each case, with no legal restraint to insure that a legal measure is set up and consistently and uniformly applied, must in the end break down the system of privately owned and operated utilities.*

Valuation on legal principles, legally assured by judicial review to require adher-

ence to those principles has for its alternative ownership and operation by the government. Unchecked administrative valuation is incompatible with our American economic order.

To cut off from the province of the judiciary scrutiny of official action involving individual rights in a field of such importance is to break with the most characteristic of American institutions, the one outstanding American contribution to politics; namely, the constitutional democracy under which all the powers of politically organized society are exercised by officials and agencies subject to the law of the land. (Italics supplied.)

What Do the Commissions Propose to Do?

THE answer to that question is to be found in many statements in the reports and other publications of the Federal Power Commission and the Federal Communications Commission. There is no space here to quote these statements. They are reflected in the report of the committee on depreciation of the National Association of Railroad and Utilities Commissioners of 1943, published by the association early in 1944, which was under discussion by various committees of the utilities and professional societies during that year. Three or four paragraphs from the "Summary" to this report give the commission views with clarity:

26. The straight-line method is generally recommended for public utility accounting and financial purposes and also for the computation of both depreciation expenses and accrued depreciation for the purpose of rate making.

• • •

37. The same factors which cause annual depreciation expense also cause accrued depreciation. Accordingly, the same principles should be applied in determining annual depreciation expense and in determining accrued depreciation.

• • •

39. A properly computed depreciation reserve is the best measure of accrued or existing depreciation, since such reserve reflects that part of the cost of property in service which relates to the exhausted or expired economic or service life.

This report was made by members of the staffs of state and Federal commissions and unquestionably reflects the views of many of the members of those bodies. While the recommendations of the committee on depreciation of the NARUC were not adopted in November, 1944, the vote was close, and a few more opinions of the courts in the case of natural gas and pipe-line companies, now coming under regulation for the first time, are likely to outline very definitely the future treatment of depreciation in public utility cases.

THE attempt has been made to trace briefly the history of the two concepts of depreciation, to show the development since the first decade of this century of the two antagonistic theories, those of the old Supreme Court and of the Federal commissions, and the apparent abandonment by the reorganized Supreme Court of all that had been built up in the way of legal control of commission regulation.

In the first article of this series the writer has given statistics of "depreciation" reserves built up by three industries. These reserves clearly are not based on experience. In the case of many individual companies they are obviously excessive. Under the theory of the Federal commissions they are to be deducted in finding a new rate base, and not remedied by making smaller annual charges as ordered by the Supreme Court in the Smith and Lindheimer cases.

Dean Pound said in 1943, "Valuation on legal principles, legally assured by judicial review to require adherence to those principles, has for its alternative ownership and operation by the

government. Unchecked administrative valuation is incompatible with our American economic order." The Hope Gas opinion, decided in January, 1944, and the Colorado Interstate Gas Case, decided in May, 1944, when it was "in all things affirmed" by the Supreme Court, have gone far toward making Dean Pound's statement a prophecy.

There is food for much thought by the telephone, electric, and gas industries.

Are we ready for "ownership and operation by the government"? The final article of this series will deal with the experience of private corporations and Federal taxpayers with Federal ownership of the electric utility.

The concluding part of this article will appear in a subsequent issue of PUBLIC UTILITIES FORTNIGHTLY.

Personal Liberty and Unionism

"THERE *is one basic law that must be placed on the statute books before our nation can ever hope to put an end to the strife between employers and employees. Pass a Federal act, which will guarantee to every person in the United States the right to work wherever he pleases, at whatever wage he can agree upon with his employer, without having to pay tribute to anyone. Such a law would have the effect of eliminating both corrupt politics aand irresponsible union leadership from the field of enterprise. These forces are accountable for nine-tenths of all the trouble laboring people have with their employers. Until this unholy combination is broken up and destroyed there can be no hope for peaceful relations between labor and management. This would not affect any fair and equitable principle of collective bargaining. It would, however, put unions on their own merits. This would, in the long run, create a much higher type of unionism and provide a finer service to the working people. The passage of such an act would be nothing more than a reaffirmation of one of the basic principles of the Constitution of the United States.*"

—FREDERICK C. SMITH,
U. S. Representative from Ohio.

Government Utility Happenings

Agencies Eye Power Companies' Bids for Army Projects

FEDERAL power agencies in Washington are engaging in considerable speculation over the recent bids of two privately owned electric utilities to take over construction on hydroelectric projects now scheduled for development by the Army's Corps of Engineers.

The Savannah River Electric Company, a subsidiary of the Georgia Power Company, late last month filed an application with the Federal Power Commission to build the entire multiple-purpose Clark Hill dam on the Savannah river, near Augusta, Georgia. Some two weeks previously, the Arkansas Power & Light Company, also acting through a developing subsidiary, asked FPC for a license to build an electric generating plant at the Bull Shoals dam, an Army multiple-purpose project on the White river in Arkansas.

Some public power circles in Washington viewed these proposals as a possible pattern for further efforts by the private electric companies to gain control of the generating capacity at all projects involving power features now being developed by the Army Engineers. However, a check with power companies in other sections of the country where the Army has started work on 16 additional multipurpose river projects revealed that no other company was definitely planning a proposal comparable to those of the Georgia and Arkansas utilities.

POWER agencies of the Interior Department are definitely opposed to any plan that would install privately owned utilities as the distributors of power generated at Army-built dams. Though there was no official comment from any Interior bureau on the Georgia and Arkansas plans, certain spokesmen for the department were quick to offer the opinion that the proposals would run afoul of "the established policy of Congress" for disposing of hydroelectric energy from such projects. These officials pointed out that § 5 of the Flood Control Act of 1944 gave Interior the authority to market power from Army developments. Apparently Interior already is preparing to take over the marketing of power at projects such as that at Clark Hill, just as its Bureau of Reclamation, Bonneville Power Administration, and Southwestern Power Administration have assumed such duties at Army-built hydroelectric projects in the western states. This was made clear in a recent speech by Harvey F. McPhail, director of power utilization for the Bureau of Reclamation, at a meeting of Wyoming rural electric coöperative members. He said:

> Let me point out here that power developed at dams built by the Army's Corps of Engineers must now be marketed through the Secretary of the Interior, so that rural coöperatives can look to various Interior Department agencies in other parts of the country as well as the West for contracts for the sale of power from flood-control dams.

Army reaction to the Georgia Power application also was unfavorable. Brigadier General James E. Newman, Jr., division engineer at Atlanta, declared that the Army "would frown on any application made by private industry" for construction of the Clark Hill project. Noting that the Army's plans, as authorized by Congress, call for the development of flood control, soil conservation, and navi-

gation features, as well as power generation, he added that such development "should be handled by this department" as provided by "existing laws of Congress."

WAR Department officials in Washington confirmed this statement of policy in regard to the Clark Hill project and further hinted that the Army would also oppose any other plan for private company operations at a hydro development of the Corps of Engineers. The Army spokesmen made no comment on Georgia Power's announcement that it planned to build the Clark Hill dam "substantially in accordance with the latest plans of the U. S. Army Engineers," with production of "all the power, navigation, and flood-control benefits that might be expected if developed by the Federal government."

The Georgia Company estimates that it can carry out these plans at an approximate cost of $45,000,000, financed entirely by private funds. The Army is proceeding under a congressional authorization providing for the eventual expenditure of $42,000,000 for the project, including hydro power facilities. Only $5,500,000 has been appropriated, however, and this amount is being used by the Army at present to complete planning and other preliminaries.

Industry observers noted that the status of Army plans for both the Clark Hill and Bull Shoals developments might be drastically altered by the recent order by President Truman curtailing Federal public works construction. The President's proposal to reduce expenditures for such works during the current and 1948 fiscal years is deemed certain to delay actual construction on a number of the Army's flood-control projects.

According to Preston S. Arkwright, board chairman of the Georgia Power Company and president of Savannah River Electric, this was one of the principal factors underlying his company's proposal to build the Clark Hill dam at this time. In the light of the President's order, he said, "the availability of adequate Federal funds for Clark Hill appears extremely doubtful." The company would begin construction as soon as it obtained a license, he said, and the project would be completed within three to three and a half years.

Mr. Arkwright also emphasized the need for additional energy which he said faced his company and other electric systems of that region. He declared that power market forecasts indicated a steadily increasing demand for energy in the Georgia and South Carolina areas during the next five years.

SAVANNAH RIVER ELECTRIC COMPANY, which originally was organized to construct the Clark Hill dam, was granted a license for the project in 1928. The company undertook preliminary engineering work, but halted its activities in 1931 because of the loss of the power load during the depression. The license was surrendered to FPC the following year. However, the company still owns 42,000 acres of the approximately 78,000 acres of land which would be flooded behind the dam.

Application for authority to build a power plant at the Army's Bull Shoals dam was filed by the White River Power Company, which was organized some ten years ago by Arkansas Power & Light. In 1936 FPC granted the company a license to construct a hydroelectric dam on the White river at a point near the Bull Shoals site. However, the Arkansas Company also experienced power load losses during this period and gave up the license in 1938.

The company's present plans call for construction of a $7,500,000 power plant, with initial installation of three 42,000-kilowatt hydro generating units. Ultimately, the plant would have five more units of the same capacity. Construction would start by July 1, 1948, or thirty days after a license was obtained, whichever was later.

The Federal Power Commission will take no early action on either of the two company applications, it is believed. FPC officials, who refused to speculate as to the eventual disposition of the proposals, declared that the applications would go

through the usual processing by the commission's technical staffs.

In some quarters it was predicted that the companies would urge the commission to approve their applications on the basis that the utility firms, in these particular cases, at least, were better able to serve the public interest than the government agency involved; *i.e.*, the Army Engineers. Important factors in such an argument could be the reported need for new generating capacity in the Georgia and Arkansas areas, and the probability that the Army could not and would not construct additional facilities within the reasonably near future.

On the other hand, some observers contend that the FPC can dismiss both proceedings on the grounds that the Congress already has granted a "license" to the Army to construct the Clark Hill and Bull Shoals projects and that the commission has no authority to set aside congressional intent in this regard.

Low-voltage Troubles Proving Headache to REA Co-ops

MORE than half of the operating electric systems financed by the Rural Electrification Administration are inadequate for serving the power needs of their present consumers. This surprising revelation was made recently by REA Administrator Claude R. Wickard before a statewide meeting of Illinois rural electric coöperatives.

To correct this situation, Administrator Wickard announced that REA engineers and many of the electric coöperatives were planning to increase substation capacity on many of the co-op systems and to replace present REA single-phase distribution lines with new multi-phase systems. The lending agency, he indicated, already has abandoned its former practice of estimating power demands for new rural systems on the basis of the consumption of 75 kilowatt hours per month per customer. REA engineers now figure the individual consumer demand is closer to 105 kilowatt hours per month.

"Operating reports of REA borrowers reaching us in Washington indicate that 432 of 835 energized REA-financed systems even now are not able to supply all the power needed by their present consumers," Mr. Wickard declared. This is largely attributable to the fact that "rural people are using more power than the distribution systems serving them were originally designed to carry."

THIS explanation is extremely interesting in view of Administrator Wickard's frequent references in recent speeches to what he termed the failure by privately owned electric utilities to properly estimate the large demand for electric energy in rural areas. Indeed, his Illinois speech contained another such reference.

Just what has happened on the now apparently inadequate co-op systems he described in the following fashion:

> In the early days of the REA program, the usual practice in starting a distribution system was to put in a substation at the location most convenient to the existing power supplier's generating and transmission facilities and start building lines from that point. This was satisfactory for a while, but, as new lines were built, more and more of the coöperatives found that the load center of consumption along their lines was getting farther and farther away from the starting point. Increasing numbers of consumers began to complain of unsatisfactory service because of low voltage at the extremities of the distribution systems.

Mr. Wickard insisted that there was no need "to apologize for the inadequacy of any existing REA-financed facilities serving rural areas." He continued:

> Our single-phase distribution systems are the best ever built for the purpose for which they were built. They have delivered and are delivering more service per dollar invested than any other rural power lines ever built. Most of these lines are giving satisfactory service, but we know that they will not be adequate in many cases to carry the increased load which is coming with the electrical age in agriculture.

The REA Administrator also implied that the agency is giving considerable thought to the possibility of increased construction of generating and transmission facilities by REA borrowers.

Wire and Wireless Communication

NEW rules of procedure and practice for the Federal Communications Commission were released this month to the legal profession and the press. The 150-page revision represents the commission's changes in procedure to meet the requirements of the new Administrative Procedure Act approved during the last session of Congress. The new rules delegate specific authority for all the various phases of the commission's work to some one officer or board of commissioners.

Under the FCC practice, principal parties to any hearing before an examiner or commissioner may submit proposed findings and if there is not substantial controversy the FCC issues a final order based on the same. Otherwise, the FCC will issue a "proposed order" and allow parties opportunity for further submission of arguments or briefs before making a final order.

The FCC proceedings generally adopt rules of evidence used in Federal courts for trials not involving jury.

* * * *

PAY increases of 16½ cents an hour for Western Union telegraph workers and 10 cents an hour for messengers were recommended on August 30th by a Federal fact-finding board. It found that telegraph pay is lower than that in the telephone industry and said that "the development of sound labor relations and the requirements of simple justice demand that this inequity be corrected."

The board recommended that the increases be retroactive to June 2nd, which is thirty days after strike notices were filed.

The Secretary of Labor, Lewis B. Schwellenbach, urged the company and the unions to settle on the basis of the findings, but there was no comment immediately from either side. The board's recommendations are not binding.

The AFL's National Coördinating Board, representing 50,000 workers, sought an increase of 18½ cents an hour. The CIO American Communications Association, representing 7,000 workers in New York, asked for 25 cents plus corrections of alleged inequities.

Figures on the present pay of the telegraph workers were unavailable in Washington, and were not cited in the board's report. Messengers have received 55 cents an hour since January 1st, when an increase from 40 cents was granted.

The company contended it was unable to pay any wage increases. The 3-member board unanimously held that inability to pay is irrelevant, but with slightly different reasoning.

* * * *

THE International Telephone & Telegraph Corporation on September 3rd sold its Argentine telephone system, the Compania Union Telefonica del Rio de la Plata, to the Argentine government for $95,000,000 in cash.

The sale culminated several weeks of negotiations between President Juan D. Peron and Finance Minister Ramon A. Cereijo with Colonel Sosthenes Behn, IT&T president, and Henry A. Arnold,

vice president in charge of South American operations. Colonel Behn flew to Buenos Aires from Paris recently to assist Arnold in the negotiations.

The properties involved serve the entire Argentine Republic with one of the most complete and modern telephone systems in the world and constituted one of the IT&T's most valuable assets in its world-wide operations.

The terms of the contract include: The cash purchase for $95,000,000 of common and preferred stocks of the Argentine company, of which IT&T owned 98 per cent; the execution of two 10-year contracts providing for IT&T's continuance as technical advisers in the operation of the system and agreement that IT&T supply the system with equipment during the life of such contracts.

In addition to the common and preferred stock, the Argentine company has debentures outstanding in the Argentine, Swiss, and Swedish markets, which the Argentine government now assumes, it was said.

The contract must be ratified by the Argentine Congress but, in view of President Peron's overwhelming congressional majority, approval was assured. Purchase of the company by the government was in fulfillment of Peron's program for the nationalization of the principal public utilities.

Colonel Behn said in a statement:

> This operation marks an interesting tendency on the part of the Peron government to repatriate foreign-owned public services by means of across-the-table dealings, rather than by recourse to expropriation proceedings and I wish to express my high regard for General Peron and the manner in which he and his ministers and their assistants have directed the negotiations.
>
> During the past twenty years or so, IT&T has made a most important contribution to international communications through installation and development in various countries of the world of some of the most efficient telephone systems in existence.
>
> We have sold our national telephone companies in certain countries, like Spain and Rumania and now in Argentina, in recognition of the national policies of those countries, endowing them with modern communications systems developed over a span of many years of painstaking labor by IT&T.
>
> The sale of our Argentine telephone company, however, does not mean that IT&T will reduce the scope of its American and international operations. On the contrary, we plan to push and develop as never before our world-wide communications system, in a manner to give the public and press practically instantaneous communication to and from every part of the world.

THE sale contract was signed in a colorful ceremony in the white room of the Rose (government) house, in the presence of President Peron, U. S. Ambassador George S. Messersmith, and the entire cabinet.

President Peron said in a speech the Argentinization of the national economy has begun and nothing or nobody could halt it. His program includes the recovery of every public service, and will be carried out as conveniences or possibilities allow.

MANUFACTURING activities of IT&T are entering the Canadian field with the establishment of a plant at Montreal by a new subsidiary of Federal Telephone & Radio Corporation, domestic manufacturing affiliate of IT&T, it was announced in New York recently.

The Canadian subsidiary, Federal Electric Manufacturing Company, Ltd., has purchased from the Canadian War Assets Corporation a plant with 90,000 square feet of floor space and an additional eight acres of land, allowing for future expansion.

The new unit, employing at the start about 200 Canadian workers, will be engaged in production of telephone, radio, and other electrical equipment. In addition to the manufacturing facilities, the building will house the administrative and general offices of the Canadian company now located elsewhere in Montreal.

* * * *

A PROPOSAL by Mayor O'Dwyer of New York city to have civil service employees of the city pull telephone cables through a few hundred feet of ducts at the Idlewild airport in Queens has been rejected by the United Telephone Organization, one of the two labor unions whose jurisdictional dispute over

that job has held up for nearly a year the installation of essential communications at the new airfield.

It was disclosed recently that the UTO, an independent union of employees of the New York Telephone Company, had notified Frederick J. Reinicke, commissioner of marine and aviation, that it would not recede from its position that the cable-pulling job, by custom and by virtue of a War Labor Board decision in a similar situation at Floyd Bennett field several years ago, should be done by its members. Local 3, International Brotherhood of Electrical Workers, an AFL affiliate, which claims jurisdiction over the job, was reported to be willing to have it done by city employees, but the report was not confirmed.

The dispute between the UTO and Local 3 arose during the administration of Mayor Fiorello H. LaGuardia, who was unable to solve the problem and left it in the lap of his successor. Local 3 served notice that if UTO members did the job the city could expect members of building trades unions to quit work at Idlewild. The UTO warned that if Local 3 handled the job its members would not touch certain work required after the cables had been pulled through the ducts.

The entire cable-pulling job, it is understood, can be done in a few days once the jurisdictional bottleneck is broken.

* * * *

TELEPHONE service will become available to 95 per cent of New Jersey's rural population under a building program announced last month by the New Jersey Bell Telephone Company.

The company said it was prepared to string up to a mile of new pole line along public highways and to erect up to five poles on private property to reach new subscribers. Construction for distances over the free limit will be made at reduced charges. The work will be done as orders come in, subject to availability of supplies and equipment.

At present, between 25,000 and 30,000 rural families in the area served by the company are without telephone service. A slightly larger number already have the service, in many cases after subscribers paid for stringing wires.

A representative of the company said that each subscriber will be entitled to five poles, if they are necessary. If two subscribers desire service, they will thus have a pool of ten poles between them.

Areas affected by the change are scattered throughout the state.

* * * *

THE state railway commission last month granted permission to three Nebraska telephone exchanges to increase their rates, effective September 1st. The Curtis and Southwestern telephone company is increasing its charges from $1.25 to $2.25 per month and will offer an improved service to its customers.

The Clarks Telephone Company will increase its rates on business phones by $1.25 a month and residential and rural rates by 50 cents a month. This is the first time since 1916 the company has raised rates. Rate increases for the Frontier Telephone Company at its Chester exchange range from $1 a month on business phones to 50 cents a month for rural phones.

* * * *

THE deadlock in the dispute between Press Wireless, Inc., and the American Communications Association (CIO) has been finally broken. When forty-six employees were laid off as a necessary economy measure, the ACA struck against Press Wireless and later imposed an embargo on overseas copy handled by that company, as well as by seven others against which the union had no grievance.

Arthur S. Meyer, chairman of the New York State Board of Mediation, ruled that Press Wireless must reinstate the forty-six laid-off employees pending arbitration of the merits of the dispute. Accordingly, the two-week-old strike ended and 300 employees who had walked out were back at their posts. The decision was hailed as a victory for the union by ACA President Joseph P. Selly.

Financial News and Comment

By OWEN ELY

The "Buyers' Strike" in the Stock Market

Based on the Dow theory, we have been in a bear market since May, 1929, when the Dow industrial average reached 212.50. The percentage decline in the Dow averages has been as follows:

	1946 High	*Sept. 9th Closing*	*Percentage Decline*
Industrials ...	212.50	172.03	19%
Rails	68.31	50.45	26
Utilities	43.74	35.00	20

Thus far the decline has paralleled that in the 1919 postwar period. If the precedent of other bear markets is followed, a considerable part of the lost ground may be recovered in a vigorous rally, which would later be canceled.

Among the possible reasons for the decline, the following may be mentioned:

(1) The huge number of new offerings, some of which enjoyed startling advances at issuance, while others remained "undigested"; all of these tended to absorb cash which would otherwise have been available to buy seasoned issues.

(2) The fact that this is a "cash" market has been cited as an important factor in the decline, but this works both ways. Curtailed buying power doubtless prevented stocks from skyrocketing as they did in 1929 (when available cash could be multiplied by three or four). On the other hand, the drop in the Dow average from 389 in 1929 to 42 in 1932 was abnormally severe because of the forced liquidation of loans. Thus the market tended to go to extremes in both directions—which should be avoidable now.

(3) Many people wonder why we can have a bear market when there is such a huge demand for finished goods of all kinds, together with a huge housing shortage, but, in lesser degree, the same conditions prevailed in 1919. The major trouble now, as then, is the serious congestion in the economic system which prevents the orderly production, distribution, and sale of goods. At that time the difficulty was mainly in transportation; now the bottleneck is in labor shortages and inefficiency, strikes, etc. One manifestation of this difficulty was the recent rise in inventories to new high levels, indicating the large amount of semifinished goods awaiting completion. In order to finance these inventories some companies have borrowed freely from the banks—another unhealthy sign.

(4) In addition to the labor bottlenecks, we have the buying and pricing difficulties due to OPA regulations, government priorities, black markets, etc. The housing industry, for example, has suffered heavily from these difficulties. So far as industrial profit margins are concerned, the new OPA regulations may gradually alleviate some difficulties. But higher prices now to be allowed for durable goods, such as automobiles, may have a depressing effect on public buying; it is too early as yet to gauge possible cancellations of orders. As far as light consumers' goods are concerned, retail sales figures are still running well above last year.

(5) While many companies have increased their dividend rates this year, most companies have been conservative and dividends did not keep pace with stock prices. Many investors have refused to buy stocks on the ground that yields of 3-4 per cent were unattractive

as compared with 2.50-3 per cent for high-grade bonds and 3.50-4 per cent for preferred stocks. The present decline will substantially correct this condition, however, and pending dividend increases may soon complete the readjustment.

(6) The international situation has been blamed to a large degree for the debacle in stocks, and foreign "liquidation" has also been suspected. The initial decline was aided by scare headlines in the New York papers over an "ultimatum" to Tito, which was not an ultimatum in the usual sense. (We merely threatened to take the issue to UN.) As far as liquidation by the Dutch, British, or French is concerned, this has probably not been of any serious dimensions, particularly after the decline got under way.

(7) Representative Sabath (Democrat, Illinois) has raised the old bogey of "short selling." Chairman James Caffrey of the SEC and President Emil Schram of the New York Stock Exchange contend that present restrictions against short selling effectively prevent old-fashioned "bear" raids, and it is doubtful whether such selling has been an important factor. Certainly Mr. Caffrey's promise to publish the names of big short sellers did not prevent the further sharp declines of September 9th and 10th.

(8) Investors in stocks have not fully realized the basic tendency toward narrower profit margins. Some companies gained a temporary respite through termination of excess profits taxes, but the "squeeze" is again under way. The inelasticity of labor costs when present sales volume diminishes is a real cause of worry.

(9) It is perhaps not generally realized that the 1946 high of the Dow industrial average capitalized 1945 earnings at 20 times, a ratio exceeding the bull market ratios of 1929 and 1937. Based on 1946 estimated earnings, the ratio at the 1946 high would have about equaled the earlier tops. It appears that the investor is unwilling to pay an average of much over 16-18 times earnings. When this limit is reached, a buyers' strike is apt to occur.

(10) Stock market forecasters have relied too heavily on the huge amount of wartime savings, which they assumed were available for use in the stock market. They overlooked the fact that much of these savings had been channeled into government bond purchases, and that a large amount was earmarked for purchase of new houses, new cars, etc. The man "in the sticks" is not tempted to divert these funds into the stock market, to any important degree, unless there is a very substantial decline.

As to the duration of the bear market, this will doubtless depend on how fast and in what degree we can cure the various maladjustments now plaguing our economy. Whether this can be accomplished in six months or a year will depend largely on the ability and energy with which Washington attacks the problem. With Congress out of session until January, nothing very spectacular now appears in the offing and accordingly we may have to "muddle through," particularly so far as labor troubles are concerned. Unfortunately, perhaps, the drop in stocks has not thus far been accompanied by any corresponding decline in commodity prices (as in 1919-20).

Utility stocks now offer excellent yields as compared with industrials. While there is a regulatory "ceiling" on earnings of many operating companies due to allowable fair return of about 5.50-6.50 per cent, on the other hand this furnishes somewhat of a "floor" for earnings as well, and the industry is practically unique in its exemption from the evils of overproduction, competition, and price cutting. Labor troubles have been negligible thus far, and the financial structures of most utilities have been greatly strengthened. At the present time seasoned utility stocks yield about 4.50-5 per cent, and yields on newer issues, particularly the Ohio stocks (Dayton, Columbus, Cincinnati, Central Ohio, and Ohio Edison) offer about 1 per cent more. While the bear market is no respecter of issues and the good suffer with the bad, investors have no reason to regard utility yields as "inadequate."

Financial Statistics of Utilities, 1940-45

C. A. Turner (208 South LaSalle street, Chicago) has recently issued the 1946 edition of *Financial Statistics of Utilities* covering the years 1940-45. The volume includes two pages of tables and charts for each of 212 electric and gas companies. These companies represent a large proportion of the electric industry (about 97 per cent in terms of aggregate revenues), as well as a substantial cross section of the gas industry (about 73 per cent, it is estimated). Incidentally, Mr. Turner's latest volume, in a new, attractive, and convenient form, contains a number of features representing an improvement even over the previous excellent statistical studies from the same source.

Total assets of these companies amount to over $18,000,000,000. The average capital structure for the 212 companies is as follows: bonded debt 46.9 per cent; preferred stock 15.4 per cent; premiums and minority interest 1 per cent; common stock 28.2 per cent; and surplus 8.5 per cent (total common stock equity 36.7 per cent). The ratio of long-term debt to net plant account is 50.2 per cent. During 1945 the ratio of gross income to capital and surplus was 5.89 per cent. The ratio of operating income to net plant account (including intangibles and plant acquisition adjustments) was about 6.15 per cent. Exclusion of known intangibles and adjustments would raise the figure to 6.40 per cent. However, about 30 per cent of gross plant account is "plant not reclassified" and it remains uncertain as to how much this substantial item may include in the way of intangibles, plant adjustments, and plant acquisition adjustments. *Financial Statistics* is particularly useful for its convenient tabulation of the available data on original plant cost, intangibles, etc. (figures which in the financial services are usually buried in obscure footnotes).

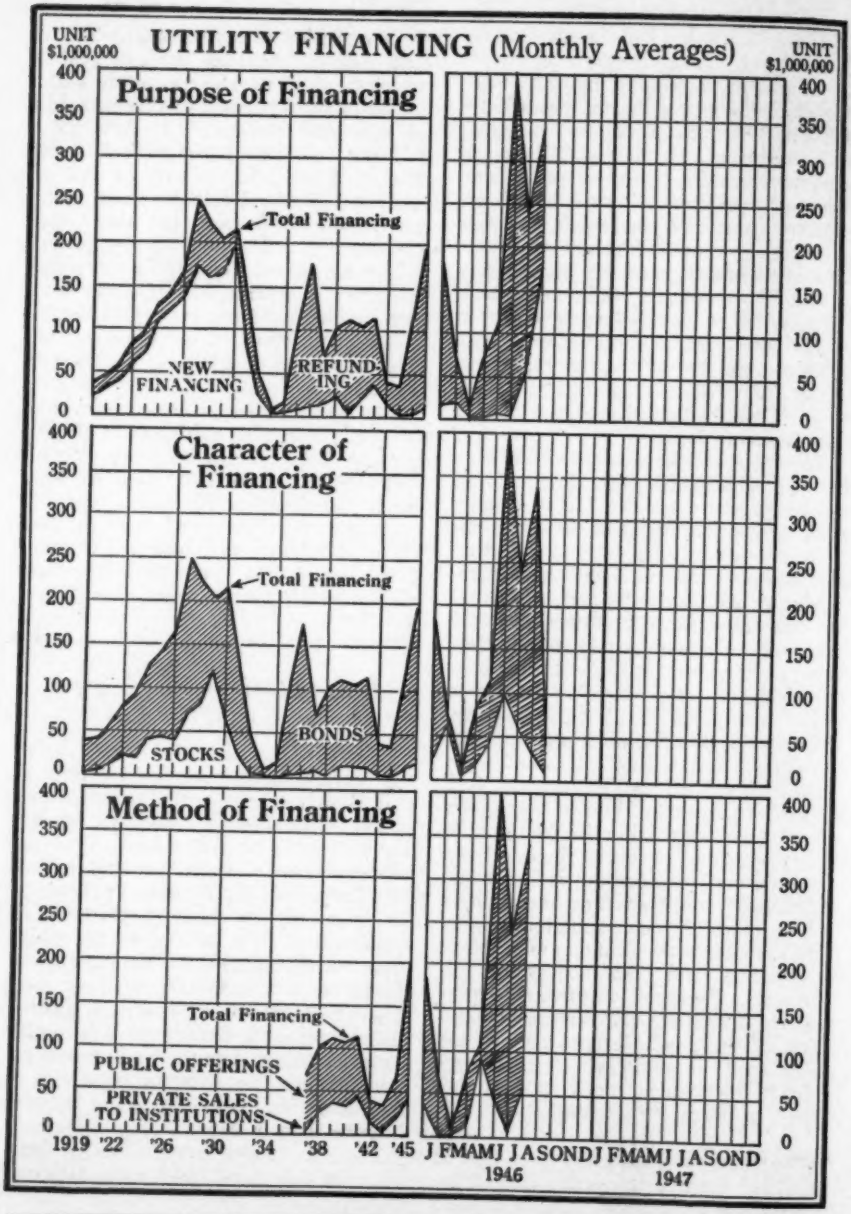
The summary table discloses that in 1945 the 212 companies earned the interest on their long-term debt 3.56 times, and their fixed charges 2.99 times; over-all coverage of preferred dividends and interest charges was 2.09. The ratio of depreciation to revenues was 9.8 per cent, and maintenance 6.3 per cent, a combined ratio of 16.1 per cent. Taxes amounted to 23 per cent of revenues. The average interest rate (long term) was 3.29 per cent (compared with 3.71 per cent in 1943), and the average rate of preferred dividend 5.18 per cent (compared with 5.66 per cent two years earlier). Gross income was apportioned as follows: fixed charges 33 per cent; preferred dividends 14 per cent; common dividends 38 per cent; and surplus 14 per cent. About 73 per cent of available earnings was paid out in common dividends.

Similar ratios are given for individual companies, together with salient income account and balance sheet items. A chart is presented for each company showing the 6-year trend of revenues, expenses, taxes, depreciation, fixed charges, preferred dividends, and balance for common stock. A "pie" chart shows the capital structure in percentages.

Rate of Gain in Net Income Tapers Off in June

The composite statement of sales, revenues, and income for class A and B privately owned utilities, issued by the FPC, shows a gain in net income for the month of June of only 15.1 per cent contrasted with 20.2 per cent in May, 32.4 per cent in April, and an average of 39.3 per cent for the first quarter. The continued increase in labor costs—which were nearly $53,000,000 in June compared with $50,600,000 in May, and about $44,000,000 in June last year—largely accounts for the less favorable June statement. The saving in amortization charges (an irregular item due to new financing) was also less favorable in June than in May.

For the twelve months ended June 30th, the gain in net income was approximately 20.1 per cent.


UTILITY FINANCING (Monthly Averages)
UNIT $1,000,000
Purpose of Financing
Total Financing
NEW FINANCING
REFUNDING
Character of Financing
Total Financing
STOCKS
BONDS
Method of Financing
Total Financing
PUBLIC OFFERINGS
PRIVATE SALES TO INSTITUTIONS
1919 '22 '26 '30 '34 '38 '42 '45 J FMAMJ JASONDJ FMAMJ JASOND
1946
1947

What Others Think

EEI Executive Urges Companies To Speed Farm Electrification

PRIVATELY owned electric utilities, pioneers in the electrification of America's farms, now must exert every effort to develop their rural service "as rapidly as possible." That conviction was expressed by Grover C. Neff, president of the Wisconsin Power & Light Company and of the Edison Electric Institute, at the annual meeting of the Rocky Mountain Electrical League at Denver, Colorado, on September 5th.

The job of building lines into unserved rural territory should be "practically completed by December 31, 1948," if the private power industry, rural electric cooperatives, and other agencies carry out their present plans, Mr. Neff declared. He recommended that the electric operating companies adopt three general practices in order to speed their share of the farm electrification job. These were:

1. Each company should maintain a properly trained staff of "men who can talk to farmers and explain to them the advantages of applying electricity to their particular farm activities."
2. Company executives and local co-op leaders should "get together and make practical, sensible agreements and arrangements for rendering rural service."
3. Having determined the rural area which it should serve, each company should "extend the service as promptly as possible to all in the area who wish it."

MR. NEFF quoted United States Census Bureau figures indicating that "as of today, about one-fourth of 5,550,000 occupied farms in the United States are located more than one-quarter mile from electric distribution lines," though three-eighths of all occupied farms actually are not using electric service. "In other words," he explained, "some 4,100,000 farms, or about three-quarters of those occupied, have been reached with electric lines, and five-eighths of the occupied farms are actually using electric service."

Incidentally, the utility executive pointed out that the electric companies serve at retail about 60 per cent of the connected farms and, through wholesale contracts, supply a "large part" of the power used by the other 40 per cent. Co-ops serve at retail about 34 per cent of the farms, with the remaining 6 per cent served by other agencies, he estimated.

Using the quoted Census Bureau figures as a base, he sized up the farm electrification task yet to be done as follows:

> According to recent surveys and estimates made by the EEI, the electric operating companies will extend service to about 600,000 farms during the 3-year period, 1946 to 1948, inclusive. Based on the best data available, it is estimated that the local co-ops will extend electric service to about 600,000 farms in the same period, and all other agencies will reach about 40,000 farms. Altogether, service will be extended to 1,240,000 farms in this 3-year period. Assuming that 300,000 farms were connected during the first eight months of 1946, it is estimated 940,000 will be connected in the remaining four months of this year and the years 1947 and 1948. If this figure of 940,000 is added to the number of farms reached at the present time (4,100,000), we get a total of about 5,000,000 farms that, by December 31, 1948, will either be using electric service or be located less than one-quarter of a mile from an electric line. . . . Most of the remaining scattered farms will have their own home generating plants.

However, extending rural service involves considerably more than the mere building of lines, Mr. Neff warned. He added:

> The principal objective of rural electrifi-

cation, in addition to furnishing light, is to get electric power efficiently applied to as many farm jobs as possible in ways that are profitable to the farmers. The building of electric distribution lines is necessary, but is only a means to an end, and a farmer does not necessarily have profitable rural electrification when a line has been built and service made available in his house and barn.

NOTING that recent technical advances have produced farm equipment which enables the farmer to do as much work as was formerly done by two or three men, the EEI executive pointed out that certain utility companies and farm organizations are working with state universities on research and experimental work designed to develop better ways of applying electric power to farm operations.

Such work, he said, might well be supported by all companies having rural business. The companies also should see to it that farm consumers are familiar with newly discovered uses for electric power. He continued:

As new and better ways are found to apply electric service to farm operations, the farm customers should be made acquainted with the new and better methods and sold on the use that they should make of them. In order to do this properly, each company needs men who understand farming and the application of electricity to farm operation, men who can talk to the farmers and explain to them the advantages of applying electricity to their particular farm activities. It seems to me that it requires, as a minimum, one man of this type for each 1,000 farm customers. There are very few power companies . . . who have that many people contacting their farm customers, and, to that extent, I believe the development of the farm load is being neglected.

Relations between the power companies and the electric coöperatives operating near them also should receive more attention, Mr. Neff indicated. He noted that there have been conflicts "here and there" between the companies and some REA co-ops, with "harsh and unfair things" being said on both sides. He compared this conflict with the rivalry that once existed between different utility companies "back in the days when there was rapid expansion of transmission line construction throughout the country."

After this rapid expansion was over, however, the companies "got together" and "made intelligent studies of the territory yet to be served," reaching agreements as to "what company could best serve certain areas." He added:

We in the utility business should realize that REA co-ops will continue to furnish an appreciable part of the farm electric service used in this country. They will serve territory adjacent to that served by the operating companies. It seems to me that it would be wise for us to approach their managers and directors in a spirit of friendliness and coöperation. It should be possible to work out with them, in a friendly way, a division of the territory yet unserved, based upon the sound economics of each case. That is, let the operating companies serve the farmers nearest . . . company lines, and let the co-ops serve farmers nearest their lines. If the operating companies prefer to have the co-ops build the distribution lines to a greater extent than this, then wouldn't it be a good thing to meet with them and have a definite understanding . . . ?

DECLARING that "some elements in the Federal government" apparently wish to use the REA co-ops in their plans for "socializing" the power industry, he said that he believed "the big majority of farmers" would not lend themselves to such a scheme. "More than any other class," he noted, the farmers "are devoted to the American system of free enterprise." At any rate, he added, "we must not let the shortsighted policy of a few national leaders prevent us from doing what we know is necessary to bring about the best service to the farmers."

Mr. Neff summed up the contribution of the private power industry to rural electrification, thus far, as follows:

Many companies are doing an excellent job . . . others are doing only a fair job, and others are doing very little. It is in the best interest of our industry that every operating company executive take another look at how his company is carrying on its rural electric service work and that he see to it that his lines are extended on an area basis and as rapidly as possible into all territory which he wishes to serve and which logically falls to his company.

It has been difficult to get materials and

man power to extend farm lines during the past four years, he conceded. However, he continued, where the necessary effort was put forth, many thousands of miles of lines were built.

He concluded with this thought: "The operating companies of the United States started rural electrification; they have developed it at a reasonable speed. Let us now do the things necessary to carry it on to an early and successful conclusion."

Recent Utility Annual Reports Feature Community Interests

In these pages, earlier in the year (issues of May 9th and June 20th), reference was made to the annual reports received for 1945 of business-managed utilities, and to certain features which were characteristic of many of them. The trend toward graphic style was mentioned, and it was noted that in some reports, especially those of companies in the Pacific Northwest, the inroads of public power were commented upon.

A score or more additional annual reports have come to hand in recent weeks, several of which present various phases of their business in a manner to attract more than cursory attention. In looking over this collection of reports, one is impressed that pains have been taken to tell the year's story in a manner out of the ordinary. The covers of most of the reports are of unique and attractive design, and create an interest to look at the inside pages. In many instances, color has been used in charts and tables, and excellent illustrations picture various operations of the utility company and, as well, the uses of electric and gas services by its residential, commercial, and industrial customers.

It is in the text of these reports, however, that the real story of a company's affairs is to be found. While illustrations and color add to the pages, and serve to break continuous type matter, it is in the actual written story that certain matters of moment to the company and to its stockholders can best be told. The broad range of company affairs, touched upon in several of these reports, indicates a definite intention to inform any reader about many angles of a company's business, aside from the usual financial statements which are included.

In the report of *American Gas & Electric Company*, it is stated that, well in advance of the end of the war, studies were completed and comprehensive plans prepared for future load building on the system's properties. In considerable detail the methods and scope of this program are described, as it applies to the residential, commercial, and industrial fields of business. As to the latter, the report says:

> . . . An important phase of this work is the program to bring new industry into the territory of your company's subsidiaries. Local managements, acting in close coöperation with local organizations such as chambers of commerce, are prepared to develop prospects and to supply industrialists seeking sites with all essential data on each community. One of your company's subsidiaries is now engaged in carrying on a national advertising campaign which is designed to bring new industries into the territory served, and this campaign is advertised in all local newspapers to direct public attention to its efforts to create greater employment for the people in the area.
>
> As a part of this new industry promotion for the central system there were recently circulated over 5,000 copies of a handsome brochure containing a colored map and showing the natural resources of the territory as well as a pictorial exposition of the subsidiaries' facilities and the service they render to a wide variety of customers. All these promotions have combined to bring a number of new industries into the territory served.

Several paragraphs tell of property additions and improvements, and of extensive construction expenditures contemplated for 1946-47. Under the head-

ing, "Investigation and Research on Extra High-voltage Transmission," the report notes:

> During the coming year, your company is actively undertaking an intensive investigation of the engineering, design, and operating problems associated with transmitting electric energy at higher voltages than have ever been used heretofore by the industry.
>
> In studying the system's expansion possibilities in the foreseeable future, it became clear that the economic and perhaps even the physical limit of the existing transmission network is rapidly being approached. . . . the purpose of the investigation is to determine the practical engineering features which will govern the economical and dependable construction and operation of facilities for extra high-voltage transmission of electric energy up to 500,000 volts. The study being undertaken this year is directed toward assuring an economical solution of this most important element in large-scale electric power supply.

ALL of this information, as well as the other data in this report, is stated simply, so that the reader gets a clear statement of a wide variety of activities of this company and its operating properties.

It is especially interesting to note that a number of these annual reports are addressed to the "Stockholders and Employees." Among the companies following this policy are: *Dallas Power & Light Company; Kansas Gas & Electric Company; Louisiana Power & Light Company; Mississippi Power & Light Company;* and the *Washington Water Power Company.*

The adoption of this policy is evidently based upon the idea that, as the employees, and patrons." And, the *Arkansas* ple of the communities served, they will be better representatives of the utility company if they are personally familiar with the story told in the annual report. This would appear to be an excellent step in the education of employees in the basic facts about the company for which they work, and of its plans for future developments, in all of which they have a personal interest.

The *Portland General Electric Company* goes a step further—its report is addressed "To security holders, employees, and patrons," And, the *Arkansas Power & Light Company* states in the opening paragraph: "We make this annual report in the form of a man-to-man letter to the four basic groups we feel should be interested in our activities and our welfare. We feel we are trustees to each of the 2,000,000 people these groups represent and want to keep them fully informed. These groups are our stockholders, our customers, our employees, and the public."

With the shifting of ownership, due to the integration proceedings under the Holding Company Act, more and more operating utility companies have broadened their stockholders' lists, oftentimes through the investment of local people. As a consequence, perhaps, of being looked upon now more as a "home company," it is noticeable that a number of these reports tell in more detail than heretofore of a utility company's activities in promoting the interests of the communities in which it does business.

THE report of *New York State Electric & Gas Corporation,* under the heading "Community and Industry Relations," states:

> . . . As a good citizen in the communities which it serves, the company, as it has in the past, contributed financially and otherwise to the civic activities so important in local community life. . . . The company's contribution in the form of taxes to the cost of local and state government including schools, hospitals, and other institutions was substantial, being nearly $2,700,000 or about $10 for each electric residential customer. . . .
>
> Membership is maintained in the Farm Electrification Council sponsored by Cornell University and the company contributes to this council for research in the use of electricity on the farm. The company also contributed to nutritional research by Cornell University School of Nutrition in its study of "the kinds of freezing and storage equipment and services which are needed in the home and on the farm."

Wisconsin Power & Light Company, in addition to maps and pictures to show the state's varied interests, calls direct attention to its being a "local" business enterprise. It remarks:

> Wisconsin Power & Light Company is an

"GREAT SCOTT, GUS, LOOK WHAT I'VE HOOKED ONTO!"

integral part of the communities it serves. In them it has an investment of more than $68,000,000. The company derives its entire revenue from the area served. It cannot seek business elsewhere, and its future success depends on the growth and prosperity of these communities.

Most of its employees are local citizens, and with their families they comprise nearly 5,000 people. In 1945 these employees received over $3,000,000 in wages and salaries and spent most of this money locally for the goods and services of their neighbors.

Portland General Electric Company's report devotes several pages of text and pictures to its service area, noting that the future of the company is inevitably bound together with that of the region it serves. Under the heading, "PGE Provides Leadership," one reads:

> Many areas look to new industries for augmenting their economy and although the Williamette valley has been and is progressive in seeking new industries, it has equal or greater opportunities in exploiting the full potential of the proved enterprises which already exist and which have brought the area to its present stage of economic development. With this fact in mind, PGE has adopted and is expanding a program of providing stimulus and leadership for the utilization of new methods which will bring increased profits and wealth to the manufacturing enterprises, retail businesses, farms, and communities of the region it serves. PGE is using the tools of research, salesmanship, and publicity to do the job.

New Orleans Public Service Company's report, of unique make-up, features on its cover a colorful design, with the words, "New Orleans—Air Hub of the Americas." As the page is turned, two local airport scenes greet one, with the statement: "Your company believes in the 'Air Future' of New Orleans. The cover of this report features the air

transport facilities offered by 'The Air Hub of the Americas.'" Thus the mutuality of utility company and community interests is presented to stockholders in an original and effective manner.

THESE few quotations serve to illustrate that this matter of community service is being given special attention. Similar interest in this phase of utility operations is to be found in each of the reports of the other companies referred to above. It is evident, in going over the pages of practically all of this collection of recent reports, that the promotion of community progress and development as a major item in their activities is more than ever a part of the plans of private utility managements. Recognition of this mutuality of interest seems to be rather well summed up in these words from the annual report of *Arkansas Power & Light Company:*

> Every citizen is interested in the operation of the utilities of his state, for no community or state can be any bigger and better than the vision and faith and courage of those who operate and control the public utilities. Ours is the industry of industries.

Thoughtful and instructive comment is made upon the questions of taxes in a number of these annual reports. The statement by *Ohio Edison Company* should be revealing to a reader of its report:

> Taxes, which approximated 20 cents of every dollar of gross revenue, are the largest single item in the cost of doing business. Utility companies and their customers carry a heavy burden of taxes—Federal, state, and municipal—each year. On the other hand, where Federal, state, or municipal government has gone into the electric light and power business, it pays no Federal taxes and often little or no state or municipal taxes. If government can do this in the utility business, it can do likewise in the shoe business, the grocery business, or any other business, including farming. There is no limit to government competition with business, if the public does not check the trend.

New York State Electric & Gas Corporation tells its security holders these salient facts about the inequities of present-day tax policies:

> . . . The company does not object to its tax bill, and believes as a business enterprise it should pay its fair share of the cost of government. It does, however, believe that direct comparisons which are often made between the rates charged for electricity by almost tax-free and almost interest-free government-sponsored or -owned entities in the electric business and the rates charged by electric companies under private ownership and management are misleading and unfair. We seriously question the justification or fairness of a national policy which fosters gross discrimination in taxes or capital costs borne by customers in one section of the country and not borne by customers in another area. In fairness and justice, steps should be taken to equalize the tax and interest-cost burdens borne by customers of governmentally owned power business and customers of individually owned business as required under government laws and regulations. At the very least there should be full disclosure of the extent to which the rates compared reflect similar tax or capital-cost burdens.

AND, *Wisconsin Power & Light Company,* in a page devoted to taxes, makes this illuminating statement:

> . . . In 1945, more than 28 cents out of every dollar that customers thought they were paying for service was really for the tax collector. Taxes exceeded the revenue received from residential customers for the entire year of 1945. In other words, if the company had been relieved of taxes in 1945 and had been able to apply the total saving to residential customers, it could have given all residential customers more than a year's free service.
>
> Wisconsin Power & Light Company, like other businesses and individuals, expects to bear its fair share of the cost of government. The company does not object to paying fair taxes, but does object to politically managed electric power projects going scot-free of most taxes that business-managed companies have to pay.
>
> Public utilities owned by cities, states, or Federal government escape many taxes which the company must pay and you must pay. They do not pay any Federal income taxes whatever. You, as a security holder and a taxpayer, have to help make up the taxes that government power plants escape.
>
> While taxes are the company's biggest single item of expense, taxes, if paid at all, are a small item with government-owned power projects. Yet, to promote government ownership, these "tax-free" operations are often compared with those of heavy tax-paying, business-managed electric companies. Such misleading promotion is unjust and unfair to the owners of electric company securities including investors in life insurance.

In almost every one of these reports farm electrification is given considerable space. Plans are outlined for extending this type of service as rapidly as materials and labor for construction work are available. *Ohio Edison Company* relates in its report:

> Over 88 per cent of the farms in the areas served by the companies enjoy the advantages and conveniences of electricity. This compares with 80 per cent for the state of Ohio, 79 per cent for the state of Pennsylvania, and 50 per cent for the United States....
>
> Up to the present time the farmer has been using electricity principally for lighting, water pumping, milking, refrigeration, cooking, incubating, brooding, and feed grinding. In the future it is anticipated that he will employ it as an aid in the utilization of waste by-products of the farm or farm crops grown specifically for industrial uses. Casein, a by-product of skim milk, in the form of plastics, paper sizing, and indoor paints is an example of such industrial applications. Kapok, insulation, plywood, alcohol, and synthetic rubber promise wide usage for waste farm products such as weeds, straw, and cornstalks.

THE growing menace to established business-managed, investor-owned electric utilities by the continued spread of the operations of Federal public power projects, is noted in several of these recent reports. The seeking by Southwestern Power Administration from Congress of initial funds with which to build an extensive transmission system, together with steam plants, drew comment from companies in whose service areas Southwestern Power Administration would directly compete. The report of *Arkansas Power & Light Company* has this to say on the matter:

> The Department of the Interior, through the Southwestern Power Administration, has proposed a far-flung public power system, covering and duplicating practically all the utilities in the southwestern region at an eventual cost of $200,000,000, with an initial appropriation of $23,000,000. The utilities in this particular area now have about 16,000 miles of transmission lines of 66,000 volts and above. The SPA proposes to build right over these lines (ofttimes down the same highway) about 15,700 miles of transmission lines of 66,000 volts and above. It also contemplates the construction of 770,000 kilowatts of steam power, to be operated in connection with federally financed hydroelectric dams....
>
> This is a very serious matter. The utilities in this area have jointly offered to buy all the power from any new hydro dams at a price to be determined by the appropriate regulatory authority and to pass all savings on to the consumers, and to build any additional transmission lines necessary to market and transmit the power from any of the proposed projects.

KANSAS GAS & ELECTRIC COMPANY'S report presents a map to indicate the magnitude of the development of public power projects authorized by Congress —as multipurpose dams to be constructed by the government in northern Arkansas, northeastern Oklahoma, and southwestern Missouri. An outline is given of the plans of Southwestern Power Administration, and of the offer of a group of privately owned utilities to purchase the entire output of its hydro plants. Stating that the "threat of government competition is real," it adds:

> The threat of government competition is real. Legislation to authorize the initial step of the construction of the proposed Federal superpower system we have described is now before the Congress. Although there are no hydroelectric projects in the immediate area served by the company and the initial portion of the proposed system does not invade our territory, it is logical to assume that if a Federal system covering with its transmission network an area three times as great as that encompassed by the TVA is constructed in territory immediately adjoining ours, it is only a matter of time until it will absorb our company and perhaps signal the end of the entire business-managed electric utility industry in this area.
>
> We strongly feel that if you believe in the preservation of the private enterprise system, including electric utilities, you should immediately express your protest against the establishment of such a system to your Congressmen and should urge the same action by your friends and neighbors who share your views.

Aside from the subjects already referred to, most of these reports give considerable space to personnel relations and employee benefits. Reference is also made to research developments which promise new and widened uses for electricity.

—R. S. C.

The March of Events

In General

To Survey Gas Industry Problems

A RECORD attendance of 10,000 members is anticipated for the twenty-eighth annual convention of the American Gas Association, to be held in Atlantic City the week of October 7th. Simultaneously with the meeting, an exhibition of gas appliances and equipment, sponsored by the Gas Appliance Manufacturers Association, will be held.

High lights of the convention will be the discussion of industry problems by speakers within and without the field at the three general sessions and the employee relations forum presently planned. The business program will also include group meetings of individual departments, including the accounting, residential gas, and technical sections.

Among the scheduled speakers are J. A. Krug, Secretary of the Interior, discussing "The Government and Business," Dr. George W. Taylor of the University of Pennsylvania, speaking on "Management's Stake in Collective Bargaining," and Elmo Roper, producer of the *Fortune* public opinion survey, who will cover "What the Public Thinks of Business."

The gas industry's stepped-up program of research and promotion with its new developments will be placed before the industry in the annual report of the association's managing director, H. Carl Wolf.

Atomic Energy Report

IT may well be possible to build an atomic power plant that would produce electric energy at an operating cost only 26 per cent higher than that of a comparable plant using coal, scientists reported on September 7th. The report was submitted by a group of scientific advisers to Bernard M. Baruch, United States representative on the United Nations Atomic Energy Commission. This would, of course, affect only production, which is but a small part of the total cost of electric power for public consumption.

The question of international control of atomic energy was mentioned only once, although in a significant connection, in the almost entirely technical report. However, this statement that peacetime use of atomic energy was now a commercial possibility was expected to give new drive to the slowed-down campaign for effective international measures to outlaw the atomic bomb.

Peaceful uses of atomic energy will remain comparatively limited because of safety precautions required to be taken against harmful radiation, but the report, in listing possible advantages, said that nuclear plants might lend themselves to decentralization of industry.

It added that the nuclear power plant might aid in the industrial development of isolated parts of the world "where the cost of oil, gas, or coal is prohibitive and where a suitable supply of water is unavailable, because the nuclear power plant, if combined with the modern gas turbine, would make unnecessary a supply of any such fuels or cooling water."

The report emphasized the suggestion that it might be possible to develop a comparatively small standardized nuclear power plant, to be placed at strategic points to supplement all established utility company systems. This, it was observed, would greatly reduce power transmission costs and permit continued operation even if the standard, or nonatomic, power plants were inoperative. The report declared, however: "Such a development would of course complicate any inspection system."

The report was based on a study prepared under the supervision of Dr. Charles A. Thomas, vice president and technical director of the Monsanto Chemical Company. A special scientific and engineering group took part in the study.

TVA Reports Savings

ELECTRIC consumers served by 35 distributors of Tennessee Valley Authority power will save an estimated $880,000 annually in their electric bills as a result of rate reductions made since June 30, 1945, G. O. Wessenauer, TVA power manager, said recently.

Of the $880,000 annual savings made effective in the past year, about one-third resulted from adoption by 12 municipally owned distribution systems of new rate schedules. The reductions during the past year brought to 20 the number of distributors which have adopted rates below the level of the original TVA rates.

It was explained that surcharges on commercial and industrial power bills, usually amount-

ing to 10 per cent, had been provided for in the rate schedules and power contracts as a means of helping to maintain revenues during the development period following the introduction of TVA rates.

Proposes to End Subsidiary

In a move designed to simplify the parent corporate structure, the General Public Utilities Corporation and its wholly owned subsidiary, General Gas & Electric Corporation, on August 30th filed with the Securities and Exchange Commission a plan for dissolution of General Gas.

If the proposal is sanctioned General Public Utilities, as the only stockholder of General Gas, will acquire all the assets of the subsidiary, subject to the latter's liabilities, if any. The assets to be inherited by the parent system include South Carolina Electric & Gas Company, a wholly owned subsidiary of General Gas.

As outlined in the application-declaration, transactions involved in the plan include:

1. Reclassification of South Carolina's outstanding 43,394 shares of $100 par value common stock into 808,587 shares of $7.50 par value common.

2. Declaration by General Public Utilities of a dividend on its common stock, payable out of capital surplus, at the rate of one-tenth share of the new South Carolina stock for each share of General Public Utilities. As of July 1st, the parent corporation had 6,200,610 shares of common outstanding.

Special Rate Proposed

A special rate for electricity used in home water heating during off-peak hours has been proposed by the Union Electric Company, which plans major entry into the water-heating market now dominated by gas appliances.

The company has applied to the state regulatory bodies of Missouri, Illinois, and Iowa for approval of a rate of 8.5 mills per kilowatt hour for urban and 9.5 mills for rural residential users. The special rate, subject to the usual discounts for prompt payment, would apply after October 1st.

Electricity supplied under this schedule would be interrupted during certain hours each day, depending upon the company's load conditions. In no event, however, would electric service to hot-water heaters be limited to less than eighteen hours daily.

To measure the amount of electricity consumed by the water heater and to control hours of service, the company at its own expense would install a special meter and time switch for approved automatic storage-type electric heaters.

SEC Approves Plan

The second step designated Plan 2-A, in the Electric Bond and Share Company's 3-part program for compliance with the geographic integration and corporate simplification provisions of the Holding Company Act was approved on September 6th by the Securities and Exchange Commission.

Simultaneously with announcement of the commission's decision, attorneys for the government agency filed an application with the Federal District Court in New York for an order enforcing and carrying out the provisions of Plan 2-A.

Bond and Share consummated the initial step in the program by making a distribution of $30 a share to holders of its $6 and $5 preferred stocks. Under the provisions of Plan 2-A, which has as its objective the complete retirement of these stocks, there will be a capital distribution of $70 a share on the stocks or, in the event of certain circumstances, a pro rata distribution on such stocks of less than $70 a share. It also calls for the sale of certain of the company's portfolio securities.

In addition to the cash payment, holders of the preferred stocks are to receive a certificate evidencing their right to receive any additional sum which the SEC and appropriate courts determine they are entitled to receive in full satisfaction of their claims.

Arkansas

Reports on Utility Rates

Arkansas' utility rates have been reduced by approximately $500,000 a year since the present state public service commission took over in February, 1945, records at the commission offices revealed recently.

Commission Chairman Charles C. Wine said the over-all reduction included lowering of rates of more than 12 companies—among them the major electric utilities serving the state. This amount does not include a scheduled $1,000,000 refund of Arkansas Power & Light Company, which will be in the form of cancellation of October bills, he said.

The total reductions included a recent removal by commission order of special charges by telephone companies for hand-set equipment, and a $90,000 reduction in the annual gas rate, which will become effective when the appeal of Mississippi River Fuel Corporation from the commission order is acted on by the Arkansas Supreme Court.

The commission on August 30th formally approved an approximate 12 per cent reduction of rates of Southwestern Gas & Electric

Company, which will result in an annual saving of $207,000 to its consumers, and set aside an earlier order asking the company to show cause why such reduction should not be made.

Favors Gas Purchase Promotion

No date has been set for a special election to determine whether the Arkansas Louisiana Gas Company distribution lines shall be bought for municipal operation because city officials are not yet "organized," Mayor Sprick said recently.

"We must carry on a promotion program," he said in reply to advertisements of the company which have appeared in Little Rock newspapers. "But first officials must agree among themselves and we have not yet agreed."

Mr. Sprick apparently referred to City Attorney T. J. Gentry's opposition to payment of any special attorney's fees in connection with acquisition of the gas system, and Alderman J. S. Abercrombie's support of the city attorney's position.

Mr. Abercrombie also has opposed the transfer of authority from the mayor and council to the board of waterworks commissioners, which was effected by resolution last month.

California

State Still May Control

The state water project authority recently revealed it has not given up the possibility of eventual state control of the huge Central Valley project.

The state authority's stand was taken when its membership voted unanimously to decline a request of the Federal Power Commission that a twelve-year-old application to operate and maintain the project be withdrawn.

The project originally was designed for construction by the state, but was taken over by the United States Bureau of Reclamation. Shasta and Friant dams and several other units have been completed, and work still is under way on other irrigation and power facilities. The authority was advised by the Reclamation Bureau that contracts totaling $25,000,000 have been awarded for additional work on the project, and while no definite word had been received from Washington on status of this work in view of the freeze on Federal public works projects, the bureau believes none of the contracts will be affected.

Utility Board Criticized

Commission control over the Municipal Railway of San Francisco was criticized recently by members of the board of supervisors, who suggested drastic changes in administrative policies.

Supervisor Marvin Lewis advocated "doing away" with the present city utilities commission, which has control over all utilities, and placing complete control in a superintendent of transportation.

Supervisor Edward Mancuso gave notice he would offer a declaration of policy for the November ballot, proposing the establishment of a separate transportation commission for railway operations.

Lewis opened fire on the commission following Mayor Lapham's recommendation of a bond issue to finance railway rehabilitation.

"When the utilities commission urged us to increase the railway fare," said Lewis, "we were told the revenue would be used to rehabilitate the railway. Now a bond issue is being proposed to accomplish that purpose."

"The commission," he charged, "has no definite plan for improving transportation. I suggest before a bond issue is submitted that experts be called in to devise a real transportation plan, whether it calls for a subway or not."

As another means of financing the purchase of new railway equipment, Supervisor Chester MacPhee reintroduced his plan for a charter amendment permitting the utilities commission to issue up to $10,000,000 in revenue bonds.

Indiana

Presses for Natural Gas

The Indianapolis city council's effort to obtain natural gas for the city was continued this month when that body approved a recommendation that its finance committee "continue at full speed its pursuit of the natural gas problem."

John A. Schumacher, council president, read a short report by Herman E. Bowers, chairman of the council finance committee, which said:

"The local gas company (now the Citizens Gas & Coke Utility) was acquired by the city September 9, 1935. At that time natural gas was available at about 3.5 cents a therm, which was then higher than the cost of gas made from coal.

"However, during the last few years the price of natural gas has decreased to about 2 cents a therm and coal gas increased to more than

4 cents a therm. As a result of these disproportionate costs, our local gas rates are higher than rates of tax-paying gas companies by over 20 per cent for house heating and 50 per cent for industrial use.

"It is our understanding that natural gas can be obtained for Indianapolis in two or three years and that two new sources of supply are in process.

"I therefore recommend that the finance committee of the common council continue at full speed its pursuit of the natural gas problem."

Change of Judge Granted

JUDGE Horace L. Hanna, Danville, Hendricks county circuit judge and special jurist in the Indianapolis Railways, Inc., injunction suit against the state public service commission, on September 3rd granted the commission's request for a change of judge.

As a result, a new judge will be chosen to hear the question of an injunction against the commission ruling which prevented Indianapolis Railways from charging a three-for-a-quarter token rate.

A temporary injunction granted by Judge Hanna last month resulted in a higher token rate despite the commission's refusal to grant that fare in the company's "emergency" appeal.

Commission officials indicated their course on a permanent fare decision will be shaped by results of the new judge's decision on the injunction issue.

Pay Increase Announced

ELEVEN hundred employees of the Indianapolis Power & Light Company will receive a 9½-cent-an-hour general wage increase, it was announced by company officials early this month, effective immediately.

The increase, the announcement said, followed an agreement reached between H. T. Pritchard, president of the company, and R. C. Benson and Ivan E. Wilson, representing the Electric Utility Workers Union.

Of the 1,100 employees, 852 are members of the union.

Kansas

New Power Rate Reduction

EFFECTIVE October 1st, customers of the Kansas Power & Light Company will save from 2 to 5 per cent on their electric bills.

An application asking for a rate reduction was filed recently with the state corporation commission by D. E. Ackers, president.

The new schedule will apply to all residential and commercial billings after the first of next month.

Mr. Ackers explained this is the fourteenth reduction in rates for Topeka since 1928 and the third this year. It is estimated that the saving to customers will be about a quarter of a million dollars this year.

Maryland

Gas Rate Case Reopened

BECAUSE of changes in net earnings of the Consolidated Gas, Electric Light & Power Company since the state public service commission dismissed the investigation of company rates November 23, 1945, the commission on September 4th ordered reopening of the case.

In line with this step, the commission will request that the case be sent back from the circuit court, where appeals from the commission's November order have been taken, Charles B. Bosley, commission chairman, said.

The case is now in its third year, proceedings having been started on January 7, 1944, by people's counsel before the commission.

Quarterly reports filed by the company "indicate such an increase in the net revenues from its electric service and such a decrease in the net revenues from its gas service as to justify and require the reopening of the investigation," according to the commission's order.

Michigan

Bonds Win Approval

THE Detroit city council on August 27th unanimously approved the much-disputed $21,000,000 DSR modernization bond issue, to go on the ballot in November, and also approved a new pedestrian ordinance and an amendment to the taxicab ordinance.

The cab ordinance amendment was approved by the seven councilmen present, but Council

President Edwards later entered a protest "for the record," and declared the amendment did not give sufficient discretionary power.

Service Charge Dropped

THE 5-cent service charge for customers paying their bills at other than company offices has been eliminated by the Michigan Consolidated Gas Company. The charge was established before World War I, when gas company bills were payable at about 750 banks and retail outlets throughout its territory.

Effective September 1st, the company is absorbing the charge at a "cost to us which will amount to thousands of dollars a month."

Nebraska

Suit Opposing Sale Dismissed

ANOTHER piece of litigation in the Omaha power controversy was disposed of this month when Federal District Judge James A. Donohoe dismissed the suit brought by the Omaha Ice & Cold Storage Company.

The decision was hailed as a victory for the Omaha Electric Committee which purchased controlling interest in the Nebraska Power Company with the announced intention of bringing about public ownership.

The ice and cold storage company filed its suit as a power user, contending that the electric committee paid too much for Nebraska Power common stock, that the sales contracts were illegal, and that power users would suffer as a result.

Judge Donohoe held that a power user could not bring such a suit.

Defendants, along with the electric committee, were the Nebraska Power and the Loup River Public Power District, Columbus, which helped finance the purchase.

W. C. Fraser, attorney for the electric committee, said the decision "takes one more piece of litigation out of the way toward full public ownership of the Nebraska Power Company."

City Buys Power Line System

THE city of Grand Island last month announced it had purchased from the Consumers Public Power District its Grand Island distribution system and the facility serving nineteen customers in St. Libory, north of the city. The price to be paid for the properties is $499,164, which includes all of the system within the city together with incidental equipment necessary for operation of the system and approximately two miles of transmission line in St. Libory.

The city also will pay $1,875.57 to cover its proportionate share of the 1945 payment in lieu of taxes due on the portion of the property being purchased.

In connection with the sale, a 10-year wholesale power contract was negotiated, whereby Consumers will furnish power to the city on the basis of 1,500 kilowatts of firm capacity. The city agrees to purchase a minimum of 450,000 kilowatt hours a month, with an aggregate yearly minimum of 7,000,000 kilowatt hours of energy on the district's standard wholesale rate —often referred to as the "Nebraska City rate" and now in effect there and in other communities where distribution is made on a wholesale basis.

Workers Set Strike Date

ROBERT K. GARRITY, international representative of the electrical workers, announced last month that the twenty-five skilled distribution and construction workers of the Norris Rural Public Power District had voted unanimously to go on strike and that 30-day notice, latter dating from August 24th, had been served.

"This represents all the employees," said Garrity, "mostly linemen and servicemen who are all members of the IBEW. We have attempted since the early part of May to effect an agreement with this district. Main obstacle has been the district's contention that it will make only a statement of policy and will not enter into signed agreement. We have a letter from the district stating they can enter such an agreement. Since that letter was written they have consistently maintained that they will not sign."

Garrity said that this matter is not covered by the NLRB (National Labor Relations Board) "which, if it did cover, would require them to sign an agreement as thousands of firms do and thus avert labor unrest."

New Jersey

Customers Get Billing Credit

RESIDENTIAL electric customers served under Classification "A" by New Jersey Power & Light Company will be presented with a 90 per cent billing credit on one month's bill, based on meter readings made from September 1 through September 30, 1946.

The 90 per cent customer dividend also will apply to the first $150 of one month's bill to commercial, industrial, and street-lighting customers served under classifications "B," "C," "F," "G," and "H."

The announcement of the customer dividend was released by the state board of public utility commissioners and the officers of New Jersey Power & Light Company. This is the seventh billing credit to be given by the company since July, 1942, and the current savings will be indicated clearly on bills mailed to customers.

Total savings to customers will be approximately $287,000, H. C. Thuerk, president, announced. This sum, together with six other billing credits given during the previous four years, brings the total customer dividends distributed by the company to approximately $1,000,000.

New York

Subway Pay Rise Proposed

PAY increases to New York city transit workers totaling $18,800,000—an average of 20 cents an hour—were recommended in the report of Mayor William O'Dwyer's special transit committee, it was learned recently.

Financially, the wage increase means the board of transportation almost certainly will have an operating deficit this fiscal year for the first time in its history. A last-minute upswing in travel last spring enabled the system to show a $7,000,000 operating profit for the year ended June 30th. The sum was used to reduce the over-all deficit of $48,000,000 resulting from debt-service charges for the system's $1,000,000,000 in obligations.

With an $18,800,000 wage increase, it is expected the current fiscal year will see a total deficit from subway operations of between $60,000,000 and $70,000,000.

The report was said to establish within limitations of the civil service laws the principle of employee recognition for the purposes of collective bargaining.

Bars Orders for Gas Heaters

BROOKLYN UNION GAS COMPANY recently announced it would accept no more orders for gas heating equipment until April 1, 1947, because of the unprecedented demand for gas "space heating" and the resultant increased gas load. "This emergency action," said Clifford E. Paige, president, "is the direct result of an overwhelming demand for gas heating. This demand is now so great that if we were to try to meet it the resulting load would far exceed our present capacity to produce gas."

Mr. Paige indicated that to keep pace with the sharply rising demand for gas the company had completed in 1945-46 more than $5,000,000 worth of its gas production expansion program. Even this, however, he said, is not enough and still further additions to the productive capacity "must be made and they are in process." He added:

"Because of the difficulties in obtaining materials and supplies we cannot make any further additions to our plant capacity in time for next winter's peak usage."

Oklahoma

Plans Aggressive Campaign

THE Grand River Dam Authority, which took over the huge Pensacola hydroelectric project from the Federal government on September 1st, plans an aggressive sales campaign to increase use of electric power in northeastern Oklahoma, France Paris, general manager, has announced.

At present, Paris said, less than half of the project's firm power potential is going directly to industry, REA coöperatives, cities, and other consumers. The remainder, surplus so far, is being sold to public utilities.

One of the major markets for the project's surplus power, he said, is in small industry and in recreational developments around Grand lake itself.

The GRDA itself is negotiating for the former Oklahoma Ordnance Works steam power plant, which can be used to firm up the dam's output.

Oregon

Power Costs Less Than TVA

RESIDENTIAL customers of Northwestern Electric pay one-eighth less for electricity, on an average, than do homes using TVA power, T. E. Roach, vice president and general manager of the company, asserted recently.

Answering a statement by Mississippi Repre-

sentative John Rankin, who said that Oregon and Washington electric users were being overcharged by TVA standards, Roach declared that "if anyone is being overcharged, it is the American taxpayer, who makes up the annual deficit on the $800,000,000 that has been poured into the Tennessee valley."

Northwestern's average price per kilowatt hour for residential service during the past twelve months was only 1.6 cents, as compared with a 1.85-cent average shown for the TVA.

"Our region is far ahead of the Tennessee valley in electrical development," he said. "Homes on Northwestern's lines use twice as much electricity as those on TVA. Eighty per cent of the farms in Oregon and Washington have electric service as compared with only 25.6 per cent in Tennessee, and the great bulk of the job here has been done by the business-managed electric companies."

Traction Sale Consummated

SALE of the capital stock of the Portland Traction Company and assets of the interurban line to the Portland Transit Company was completed in San Francisco recently.

Estes Snedecor, referee in bankruptcy, said that Ralph H. King, attorney for the independent trustees of the Portland Electric Power Company, of which the traction company has been a subsidiary, confirmed by long-distance telephone that the final arrangements had been completed and that the money "is in the bank."

Final cash payment of $5,116,750 was made on the original $7,900,000 deal, $1,000,000 of which was for the interurban line. The Portland Transit Company had put up $200,000 in earnest money at the time of the bid and at the time of execution of the contract had added $300,000 more.

Pennsylvania

Commission Bars Use of Staff

THE state public utility commission's refusal to turn over its staff of expert utility examiners to the city of Pittsburgh will not mean calling off the city's campaign for lower street-lighting rates.

"This means the entire burden of employing experts and paying them fees will be borne by the city, but we shall continue the case," City Solicitor Anne X. Alpern said recently.

Refusal of the commission to provide its specialists was received by council's finance committee. John Siggins, Jr., chairman, said:

"In formal complaints filed with the commission, in which the commission sits as a determining body . . . the burden of producing testimony in support of the complaint is upon the complainant."

Therefore, the city will not be able to carry out its plan of reducing the cost of the case by getting the help of the commission's staff of engineers, accountants, analysts, rate specialists, and other public utility experts.

South Carolina

Co-ops Oppose Sale

THE South Carolina Electric Coöperative Association, at a special meeting in Columbia recently, passed a resolution to "do everything we possibly can to prevent the sale to any private utility of Clark's Hill."

The meeting followed an announcement by the Savannah River Power Company, a Georgia concern, that it would petition the Federal Power Commission for the authority to construct a power dam at Clark's Hill on the Savannah river.

Protests from a number of South Carolina political and Clark's Hill authority leaders followed the announcement. The South Carolina Electric Coöperative group, representing 22 operating coöperatives in the state, said that they would fight to keep the project under government construction.

Wisconsin

Electric Rates Cut

REDUCTION of electric rates that will mean an annual saving of $76,254 for 27,175 Madison Gas & Electric Company customers was authorized recently by the state public service commission, effective September 3rd.

The move came at the suggestion of the commission, which analyzed the firm's rate structure and suggested the rate reduction. The breakdown shows a reduction of $51,131.24 for 23,174 residential customers; $1,964.84 for 859 farm service customers; and $23,157.96 for 3,142 commercial customers.

The Latest Utility Rulings

Investment Banking Company Owning Gas Stock Not a Gas Company

An investment banking company's application for an order authorizing its acquisition, as an underwriter, and for the purpose of resale, of securities of gas, electrical, or water corporations was dismissed by the Missouri commission for want of jurisdiction.

Several years ago the applicant had helped organize some utility companies. Its compensation consisted of common stock of such companies, which the applicant has retained as an investment. As a result it now owns a majority of the issued and outstanding common stock of a gas company. A query had been raised as to whether or not the investment banking house was also a "gas corporation" within the meaning of germane statutes by virtue of this stock ownership. For this reason, the company found that it was not acceptable as an underwriter of utility stock issues in the absence of commission authorization.

St. Joseph Light & Power Company was proposing to make an offer to underwriters of first mortgage bonds, and Union Electric Company similarly proposes to make an offer of preferred stock. The applicant had been invited to become a member of underwriting groups formed to bid on such issues. Therefore, the applicant sought the order authorizing such acquisition, or, in the alternative, a finding that it was not a gas, electrical, or water corporation within the meaning of Missouri statutes.

The commission said that, while it is without authority to expound authoritatively any general principle of law, the proper discharge of its duties necessitates a determination as to whether it may legally act under a given law. And where the statute is plain, it observed, it has no alternative than to follow the statute's directions.

The commission ruled:

> The portion of the statute which has prompted the filing of the application, and under which the applicant has requested an order of authorization, is found in subsection 2 of § 5651 R S Mo 1939, and reads as follows: "No such corporation (referring to a gas, electrical, or water corporation) shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business . . . unless . . . authorized so to do by the commission."
>
> In § 5578 the terms "gas corporation," "electrical corporation," and "water corporation" are defined. It is clear that neither the applicant nor Central West comes within the definition of a water corporation or electrical corporation. The definition of a "gas corporation" is as follows: "The term 'gas corporation,' when used in this chapter, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling, or managing any gas plant operating for public use under privilege, license, or franchise now or hereafter granted by the state or any political subdivision, county, or municipality thereof."
>
> The plain language of the statute quite clearly excludes the applicant from the term "gas corporation" as defined. Only by stretching the scope of the definition beyond the words actually used may one argue that a gas corporation is one which *indirectly* owns, operates, controls, or manages any gas plant. If the legislature had intended such meaning, it undoubtedly would have inserted the word "indirectly."

Giving effect, therefore, to the statutory definitions which govern jurisdiction, the commission held that it was without jurisdiction to authorize the investment banking house, as such, to acquire the securities of a gas, electrical, or water corporation. *Re Stern Bros. & Co. (Case No. 10,801).*

Complaint against Water Service to New Consumers Dismissed

A CALIFORNIA rice growers' association complained of a water utility's plan to serve new consumers and allocate available water according to growers' past needs. The rice growers feared that the new service would result in their having an inadequate water supply.

The state commission dismissed the complaint on the principle that a water utility has a responsible duty to allocate its water supply upon as reasonable and fair a basis as possible. Allocation according to past needs was considered consistent with state policy in regard to conservation of water resources. *Yolo County Rice Growers Asso. v. Clear Lake Water Co. (Decision No. 39058, Case Nos. 4826, 4684).*

Prudent Investment Rate Base Fixed

THE prudent investment theory of rate making has been adopted by the Louisiana commission in an electric rate case.

The commission departed from the fair value theory in view of the Supreme Court decision in the Hope Natural Gas Company Case leaving commissions free to build the rate regulation process on prudent investment as far as the Federal Constitution is concerned. The commission also noted that no Louisiana decisions or statutes direct the use of fair value.

Money is prudently invested, said the commission, even though it is in excess of the original cost of property purchased, if the excess was paid as the result of arm's-length bargaining between nonassociated buyer and seller, if the excess was necessary for integration of property, and if the purchase would reasonably result in public benefit. The commission said:

> This integration cost or excess of purchase price over original cost termed in prescribed system of accounts as "Utility Plant Acquisition Adjustments" should remain a part of the prudent investment during the life of the physical property to which it was applied, and its extinguishment from the investment when and if required by the commission, should be accomplished by amortization through annual charges to Operating Revenue Deductions during the life of the property remaining after the date of the purchase which created the excess.
>
> The rate base to be used in determining a fair return shall be the total original cost of the property in useful service plus the allowable amount of Utility Plant Acquisition Adjustments not amortized through charges to Operating Revenue Deductions plus a reasonable allowance for materials and supplies and for cash working capital, less the amount of capital secured from customers as contributions and construction advances.

Abandonment of the fair value theory, in the opinion of the commission, called for abandonment of fair value concepts of depreciation. The investment still exists and property is used and useful until removed from service, when it should be removed from the property account at original cost and the investor should receive the amount of the investment from the reserve accumulated by charges to operating revenue. This is the so-called undepreciated rate base.

Interest rates for money change from time to time. Scientific progress changes the foreseeable useful life expectancy of material and equipment. Therefore, said the commission, any sinking fund based on a fixed rate and a fixed period of time would be unsatisfactory; any fixed service life basis for straight-line depreciation would ignore technological changes. The commission was of the opinion that both the amount of annual depreciation charge and size of depreciation reserve should be determined by the exercise of judgment and should be examined periodically.

Legal title to the money collected to cover depreciation is held by the utility. Customers have an equitable interest in the reserve, and some of the elements of a

trust apply. The customer, it was held, is entitled to receive whatever interest can be earned by judicious use of the money. This interest should be applied as a deduction from allowable net operating revenue. *Louisiana Pub. Service Commission v. Louisiana Power & Light Co. (Docket No. 4271, Order No. 4346).*

Rate Order under Natural Gas Act Upheld

THE Interstate Natural Gas Company, Inc., unsuccessfully sought to overturn the order of the Federal Power Commission in *Re* Interstate Natural Gas Co. (1943) Opinion No. 91, 48 PUR(NS) 267, fixing rates for natural gas sold to pipe-line companies. The company insisted that the rates were not within the jurisdiction of the commission and that the order was confiscatory.

The commission was held to be correct in its position that the order must be viewed in its entirety and that it is not the theory but the impact of a rate order which counts. If the total effect of the rate order is not unjust and unreasonable, said the court, judicial inquiry ends. The commission had pointed to the admitted fact that rate schedules as a whole established by the order were producing a 6.5 per cent return on the rate base. The commission had invoked the "settled principle" that the rate order must be viewed not piecemeal but viewed in its entirety.

On the jurisdictional point the court said that there was no doubt that the sales in question were within the purview of the act since they were sales in interstate commerce, and the gas was sold for resale for ultimate public consumption. This being so, the exception of producing and gathering facilities would not apply.

Judge Waller, in a dissenting opinion, declared that there was no sale in interstate commerce as defined by the Natural Gas Act, although the sale was made with knowledge that the gas was intended to be transported and sold by its purchaser in interstate commerce. There was no contract of sale made in Louisiana with delivery of the commodity to be made in other states. The sale was made and title passed in Louisiana. *Interstate Nat. Gas Co., Inc. v. Federal Power Commission et al. (No. 10701).*

Depreciation Fund Earns Income

A PETITION of Central Missouri Telephone Company for modification of the order of the Missouri commission, in 62 PUR(NS) 129, requiring a credit for earnings of the depreciation fund was dismissed by the Missouri commission. This order, among other things, required that in rate making income should be determined on depreciation funds and applied in reduction in annual charges to operating income. For this purpose such income was to be computed at 3 per cent of the principal amount of the fund.

The telephone company argued that its depreciation reserve was represented by special cash deposits, working funds, and materials and supplies. It urged that no earnings had accrued upon the fund.

The commission, however, pointed out that materials and supplies and working capital are elements considered in arriving at a rate base upon which the company earns a return.

Moreover, the Central Missouri Company had not attempted to maintain a segregated depreciation fund; all cash received was deposited in the same bank account and used for all purposes for which the corporation might require cash. No explanation was made as to how the company was able to allocate all additions to expenditure of surplus rather than the expenditure of depreciation fund.

The commission noted that in fixing the 3 per cent rate it had taken into consideration the fact that utilities at times

varying with economic conditions are not able to invest depreciation funds in income-producing assets. *Re Central Missouri Teleph. Co. (Case No. 10,723).*

Note Issues to Bank Exempted from Competitive Bidding

An application of the Washington Gas Light Company for authority to issue $8,000,000 of its notes to four commercial banks was approved by the District commission.

Exempiton from the competitive-bidding rule was granted.

The notes are to be issued from time to time under the terms of a credit agreement.

They are to bear interest at the rate of 2 per cent per annum. They will mature serially. Prepayment may be made but the company is to pay a premium which will result in a yield basis for the period intervening between the date of prepayment and the stated date of maturity of 1½ per cent, but in no event shall a premium exceed 2½ per cent of principle amount of a note so prepaid.

Extensions of time for borrowing are to be granted upon payment of commitment fees. The arrangement permits the company to draw down funds when they are actually needed in the amounts required from time to time. The company may elect to borrow less than the aggregate amount available to it in the event its actual construction requirements are less than its present estimate of such requirements. *Re Washington Gas Light Co. (PUC No. 2424/15, Formal Case No. 357, Opinion and Order, Order No. 3063).*

Other Important Rulings

A territorial agreement under which a municipal electric utility sought to escape its obligation to serve was considered by the Wisconsin commission as perhaps desirable and binding between its parties but virtually ineffective as a limitation on commission jurisdiction to require that reasonably adequate service be rendered. *Re City of Wisconsin Rapids (2-U-2167).*

The Utah commission approved a motor carrier's request for authority to operate intrastate where a consideration of such factors as the need for the proposed service, the physical and financial ability of the applicant, his willingness to comply with commission regulations, and the condition of the highways to be traveled upon, indicated that authorization would be to the best interests of the people of the state and the area to be served. *Re Dooley (Case No. 2997).*

Increased rates for the transportation of logs by common and contract motor carrier were authorized by the Washington department where it was found that existing minimum rates would afford a fair return to the haulers only if they operated illegally by hauling loads in excess of the legal weight limit. *Re Increased Rates for Logs (Cause No. T-7994).*

The objections of a competing motor carrier to the transfer of the certificate of a sight-seeing bus company were overruled by the Colorado commission, which decided that mere nonuse is insufficient evidence of an abandonment of operating authority and that the purchase price of a certificate is not excessive where anticipated business greatly exceeds past demands for service. *Re Barcroft (Application No. 7389-Transfer, Decision No. 26283).*

Note.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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VOLUME 64 PUR(NS) NUMBER 5

Points of Special Interest

Titles and Index

TITLES

INDEX

Re Northern States Power Company

Opinion No. 138
July 3, 1946

CONSIDERATION *of accounting proposals of power company and of Commission staff; order entered directing disposition of amounts classified in adjustment accounts.*

Accounting, § 3 — Authority of Federal Power Commission — Uniform accounts.

1. The accounting authority of the Federal Power Commission under § 301 of the Federal Power Act, 16 USCA § 825, supplemented by other provisions of the act, is comprehensive and extends to the basic books of accounts of public utilities and licensees, p. 259.

Accounting, § 6 — Uniform system — Fundamental books of account — Supplementary accounts.

2. A power company subject to the jurisdiction of the Federal Power Commission is required to reflect entries prescribed by Commission order on its fundamental corporate books of account, and any failure to do so is a violation thereof, although public utilities and licensees may keep necessary and appropriate supplementary and memorandum accounts as well as subdivisions of the accounts prescribed in the Commission's uniform system, provided that the integrity of the uniform system is not impaired, p. 259.

By the COMMISSION: Northern States Power Company, a corporation organized and existing under and by virtue of the laws of Minnesota, on April 16, 1946, filed an application requesting our approval of certain accounting entries disposing of amounts classified in Plant Acquisition Adjustments (Account 100.5 items) and Plant Adjustments (Account 107 items). The company's application is an outgrowth of the order of this Commission prescribing a Uniform System of Accounts for Public Utilities and Licensees which became effective January 1, 1937. Electric Plant Instruction 2–D of the system of accounts requires the reclassification of the electric plant of public utilities and licensees and the submission to the Commission of adjusting journal entries necessary to reflect the reclassification.

In accordance with these requirements, Northern States Power Company submitted on July 1, 1940, a reclassification of its electric plant accounts. Subsequently several amendments thereto were filed.

The staff of the Commission made a field examination of the company's reclassification studies and amendments thereto and, in addition reviewed the changes in plant account from January 1, 1937, to December 31, 1944.

During the course of the field examination and after completion thereof, several conferences were held with company representatives for the purpose of discussing the adjustments proposed by the staff to the company's studies. As a result of such conferences, Northern States Power Company, on January 14, 1946, filed supplementary reclassification studies as of December 31, 1944, which reflected all of the adjustments proposed by the Commission's staff. As a result of further conferences, the company filed a proposed plan of disposition of the adjustment amounts.

As of December 31, 1944, the amount of Plant Acquisition Adjustments (Account 100.5 items) remaining for disposition aggregate $23,045,-255.92,[1] all of which represent an excess of system or arm's-length cost over the estimated original cost of the properties at dates of acquisition. The company proposes to dispose of this amount by charging $21,646,-056.87 to "Reserve for Possible Adjustment of Utility Plant Accounts and Other Balance Sheet Accounts" and $1,399,199.05 to "Paid in Surplus."

The amount of plant adjustments (Account 107 items) remaining for disposition at December 31, 1944, is $8,753,460.73 and the disposition proposed is as follows:

"To Reserve for Possible Adjustments of Utility Plant Accounts and Other Balance Sheet Accounts:"		
Profit and discount on securities issued to associated companies		$6,620,156.30
Estimated profit in engineering, supervision and legal fees, paid associated companies		2,965,937.48
Discount and expense on bonds of predecessor companies		522,748.58
Duplicate interest during construction capitalized		147,240.89
Overheads, interest, and taxes on idle lands		95,395.25
Overheads included in recorded cost of acquired property		95,600.37
Premium and interest on bonds called		33,475.00
Payments to telephone companies for changes to meet Northern States Power Company construction standards		107,453.01
Debt discount and expense		58,371.87
Discount on capital stock issued in acquiring properties		27,170.00
Rate case expenses erroneously capitalized		28,680.46
Preliminary survey and investigation charges		258,265.36
Expenses erroneously included in Organization account		37,065.63
Miscellaneous adjustments		102,986.67
Sub-total		11,100,546.87
Less:		
Excess of recorded retirements of gas and transportation properties, disposed of since January 1, 1937, over staff's adjusted original cost thereof	$968,281.74	
Excess of recorded retirements of acquired properties over staff's adjusted original cost thereof	2,278,322.00	3,246,603.74
Total		$7,853,943.13

[1] This includes $21,071,900.88 excess over original cost applicable to several departments (electric, gas, water, etc.) of the utility, but inasmuch as a satisfactory allocation of the excess to departments could not be made, the company has elected to dispose of the amount as a whole without the necessity of segregation by departments.

To Other Balance Sheet Accounts:	
To Account 250, Reserve for Depreciation (representing unrecorded retirements, salvage, removal cost, etc.)	$215,305.57
To Account 111.2, Advances to Associated Companies	102,885.48
To Account 131, Materials and Supplies	(371.86)
To Account 142, Preliminary Survey and Investigation Charges	621,007.00
To Account 212, Advances from Associated Companies	(2,549.47)
To Account 265, Contributions in Aid of Construction	(36,759.12)
Total	899,517.60
Total Account 107 items remaining as of December 31, 1944	$8,753,460.73

In the period from January 1, 1937, to December 31, 1944, Account 100.5 items were decreased a net amount of $2,764, 199.04, and likewise Account 107 items decreased $26,331,792.82. Certain of these decreases occurred in connection with proceedings before the Securities and Exchange Commission involving a recapitalization of the company, others having the effect of dispositions represent the reversal of appraisal write-ups recorded in the plant control accounts and other miscellaneous credits resulting from the sale of properties, etc. As the result of these adjustments, the company's Earned Surplus Account was completely exhausted. We have examined the dispositions and credits to the Plant Acquisition Adjustment Account and the Plant Adjustment Account and are of the opinion that there is no occasion to require Northern States Power Company to reclassify such amounts and order their disposition herein.

The "Reserve for Possible Adjustments to Utility Plant Accounts and Other Balance Sheet Accounts" and "Paid-in Surplus" are to be created as the outgrowth of proceedings before the Securities and Exchange Commission in the Amended Plan for Liquidation and Dissolution of Northern States Power Company (Delaware), parent of applicant. The plan was approved by that Commission in its order of October 31, 1945, (see [1945] 62 PUR(NS) 443), and in such order the Commission required that no charges other than those specified in the Amended Plan be made to the above-mentioned reserve account, and that no charges shall be made to the "Paid-in Surplus" without prior approval of that Commission. The adjustments to be disposed of to such reserve account and to "Paid-in Surplus" detailed above, may be summarized as follows:

Reserve for Possible Adjustments of Utility Plant Accounts and Other Balance Sheet Accounts	$29,500,000.00
Paid-in Surplus	1,399,199.05
Total	$30,899,199.05

The Public Service Commission of North Dakota has stated that the dispositions proposed by the company meet with its approval.

[1, 2] In its application for our approval of the disposition plan, the company incorporates the following reservation:

"The result of the foregoing plan of disposition is a substantial contribution by the company's present stockholders, no part of which has been recovered by them or by the company through earnings or otherwise. Accordingly the above proposal, and the accounting entries to give effect thereto, are submitted for the sole purpose

of meeting the accounting requirements of such Uniform System of Accounts prescribed by the Federal Power Commission as interpreted by the Commission, without recognizing or admitting the necessity or propriety of such accounting entries for any other purpose whatsoever, and such accounting entries, when made, shall not be construed as recognizing, admitting, effecting, affecting or establishing any value or values of the property of the company for rate making or any other purpose whatsoever, and are not regarded by the company as in any manner changing or affecting the value or values of such property as presently reflected on the books of the company or otherwise; and this reservation includes but is not limited to the right of the company at any time thereafter to maintain such Plant Acquisition Adjustments on its books of account for purposes other than the accounting requirements of the Federal Power Commission and to include such Plant Acquisition Adjustments in the property of the company for rate-making purposes or otherwise."

It is not clear from the above language whether the company, at some time in the future, intends to maintain its corporate accounts with respect to the plant acquisition adjustments in a manner different from the requirements of the Uniform System of Accounts and our order in this proceeding, or if it merely entertains the desire to set up memorandum accounts for the purpose of keeping a record of the amounts which it now proposes to write off. By reason of this lack of clarity we deem it appropriate to set forth our views on the question which may be inherent in this reservation. Section 301(a) of the Federal Power Act, 16 USCA § 825(a), authorizes this Commission to prescribe a system of accounts and requires public utilities and licensees to keep their accounts, books, records, etc., in accordance therewith. Our comprehensive authority and jurisdiction in the matter of accounting was settled by the Supreme Court in the Northwestern Case.[2]

The question which may arise by reason of the language used in applicant's reservation is whether our accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee. We have previously considered this identical matter. In the Northwestern Case, where the utility maintained that the Commission's authority was limited to the prescription of memorandum accounts (1940) 2 FPC 327, 331, 36 PUR(NS) 202, 207, we said:

"In view of the provisions of the Federal Power Act and the decisions of the United States Supreme Court, there can be no doubt about our authority to require the company to keep general corporate and other fundamental accounts and records covering its entire electric utility business in conformance with the provisions of our system of accounts."

On review of our order, the company contended that this Commission did not have authority to control its fundamental corporate books of account but both the circuit court of ap-

[2] Northwestern Electric Co. v. Federal Power Commission (1944) 321 US 119, 88 L ed 596, 52 PUR(NS) 86, 64 S Ct 451. See also: Pacific Power & Light Co. v. Federal Power Commission (1944) 53 PUR(NS) 12, 141 F2d 602.

peals for the ninth circuit[3] and the Supreme Court rejected that contention.

A review of the legislative history of the Federal Power Act indicates clearly that the Congress was fully cognizant of the fact that uniform and comprehensive accounting authority was not only desirable but a vital necessity to the effective regulation of electric utilities.[4] It took positive steps to correct the abuses resulting from deceptive and unsound practices which were brought to light by the Federal Trade Commission's report on its investigation of the public utility industry and to prevent their recurrence.

If public utilities and licensees are permitted to reflect in their basic corporate books of account entries at variance with those required under the Uniform System of Accounts prescribed by this Commission, or our orders issued with the respect thereto, the way would be immediately opened for a return to the accounting abuses revealed by the Federal Trade Commission's investigation.

Awareness of the foregoing fact caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees. This authority is set forth specifically in § 301 of the Federal Power Act, *supra,* and is supplemented by other provisions of the act, including § 302, 16 USC9 § 825a, which deals with the fixing of depreciation rates and accounting for depreciation, § 305, 16 USCA § 825d, which prohibits the payment of dividends from funds includible in capital account, and the provisions of § 203, 16 USCA § 824 b, dealing with consolidations and mergers. Frequently the most important question presented in consolidation and merger proceedings relates to possibility of introducing inflation in the plant accounts and the capital structure, and this the Commission would be unable to prevent if the utility's basic corporate accounts are not kept according to its orders. In other words, if the corporate accounts in respect to the capital, surplus plant, and depreciation in particular, are not kept according to this Commission's requirements, important provisions of the Federal Power Act will be rendered nullities.

Of course, public utilities and licensees may keep such other supplementary and memorandum accounts as well as subdivisions of the accounts prescribed in our uniform system, as may be necessary or appropriate, provided that the integrity of our uniform system, an essential element in the administration of the Federal Power Act, is not impaired.[5]

Therefore, Northern States Power Company is required to reflect the en-

[3] Northwestern Electric Co. v. Federal Power Commission (1943) 48 PUR(NS) 65, 134 F2d 740.

[4] Conference Report, House of Representatives, No. 1903 (74th Congress, First Session) pp. 63–75. See also Senate Report No. 621 (74th Congress, First Session) p. 53; House Report No. 1318 (74th Congress, First Session) pp. 30, 31; 79 Congressional Record pp. 10574–10575; and Hearings on H. R. 5423 (74th Congress, First Session) pp. 2170, 2171.

[5] The court of appeals for the District of Columbia in Arkansas Power & Light Co. v. Federal Power Commission (1946) — US App DC —, 64 PUR(NS) 193, — F2d —, reversed the decision of the district court (1945) 61 PUR(NS) 474, 60 F Supp 907, which dismissed the case on the holding that the question—whether or not the basic corporate accounts of the Arkansas Company must be kept in accordance with the provisions of our system of accounts. The court held that the district court should decide that question.

tries prescribed by our order herein on its fundamental corporate books of account, and we will consider any failure to do so a violation thereof.

An order will be entered in accordance with this opinion.

ORDER

Upon consideration of the company's proposal and the staff's investigation of the matter, as more fully described in Opinion No. 138, which is made a part hereof by reference, the Commission *finds* that:

(1) The proposed disposition of amounts classified in Utility Plant Acquisition Adjustments (Account 100.5 items) and Utility Plant Adjustments (Account 107 items), as hereinbefore described, are reasonable and appropriate for the purposes of the Federal Power Act.

(2) It is reasonable and appropriate for the purposes of the act that the company prepare and submit a revised statement "F" of its reclassification studies as of January 1, 1937; and

The Commission *orders* that:

(A) The company dispose of the $23,045,255.92 included in the Utility Plant Acquisition Adjustment Account (Account 100.5 items) by charging $21,646,056.87 thereof to "Reserve for Possible Adjustments of Utility Plant Accounts and Other Balance Sheet Accounts" and $1,399,199.05 to "Paid In Surplus."

(B) The company dispose of $8,753, 460.73 included in the Utility Plant Adjustment Account (Account 107 items) by charging $7,853,943.13 to "Reserve for Possible Adjustments of Utility Plant Accounts and Other Balance Sheet Accounts" and the balance to the following accounts in the amount shown:

Account 111.2, Advances to Associated Companies	$102,885.48
Account 131, Materials and Supplies	(371.86)
Account 142, Preliminary Survey and Investigation Charges	621,007.00
Account 212, Advances from Associated Companies	(2,549.47)
Account 250, Reserve for Depreciation	215,305.57
Account 265, Contributions in Aid of Construction	(36,759.12)
Total	$899,517.60

(C) The company prepare and submit on or before December 31, 1946, a revised Statement "F" of its reclassification studies as of January 1, 1937.

(D) The company submit certified copies of the entries effecting the dispositions herein approved within sixty days from the date of this order.

(E) The provisions of this order are not to be construed as dispensing with the requirements of the Public Utility Holding Company Act of 1935, or the rules, regulations, and orders issued by the Securities and Exchange Commission.

FEDERAL POWER COMMISSION

Re The Central Nebraska Public Power & Irrigation District

Opinion No. 136, Project No. 1417
July 12, 1946

APPLICATION *by state power district for exemption from payment of annual charges under Federal Power Commission license for power project; denied.*

Return, § 2 — Definition of profit — Municipal profit under Federal Power Act.

1. A profit results if, for a given period, revenues exceed properly allocated costs; and nothing in the legislative history of the exemption clause of § 10(e) of the Federal Power Act, 16 USCA § 803(e), shows that Congress intended a concept of municipal profit differing in any respect from that generally accepted, p. 265.

Water, § 20.4 — Licensed power project — Annual charge — State utilities — Profit.

2. The provision in § 10(e) of the Federal Power Act, 16 USCA § 803(e), for exemption from annual charges under a power project license, in the case of sales of power by an agency of a state to the extent that power is sold without profit, does not exempt sales with profit, p. 265.

Water, § 20.4 — Licensed power project — Exemption from annual charges — State power district — Profit.

3. A power district is not exempted from paying annual charges under a power project license, pursuant to § 10(e) of the Federal Power Act, 16 USCA § 803(e), on the theory that since it acts as an agency of the state it cannot make a profit; the doctrine that because a municipal power system is conducted for the public benefit there can be no public profit is a confusion of the terms "public benefit" and "public profit," p. 266.

Statutes, § 17 — Construction.

4. A legislative body is presumed to have used no superfluous words in a statute, and a Commission interpreting a statute is required to give effect to every clause and part of the statute, p. 267.

Water, § 20.4 — Licensed power project — Exemption from annual charges — State power district — Profit used for additions.

5. A conclusion that a state power district claiming exemption from annual charges under a lower license, pursuant to § 10(e) of the Federal Power Act, 16 USCA § 803(e), is a profit-making enterprise is found in authorization for construction of additions and extensions out of excess revenues, in view of the rule that construction of extensions from revenues is a use of profits, p. 267.

Expenses, § 33 — Repayment of capital investment — State power district.

6. Repayment of capital investment of a state power district is not an ex-

pense of producing power which the district sells; as a matter of fundamental principle such repayment of capital investment can be made only from profits, p. 268.

Accounting, § 6 — Uniform system — Application to public district.

7. Agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public are required by § 303 of the Federal Power Act, 16 USCA § 825b, to conform to accounting requirements for licensees and public utilities as prescribed by the Federal Power Commission; and although these Federal agencies are not licensees under the act, there is no difference in the accounting treatment of their costs, revenues and expenses, and the treatment prescribed for public utility companies and licensees, particularly in so far as concerns the determination of net income, p. 268.

Water, § 20.4 — Licensed power project — Exemption from annual charges — State power district — Profit on power resold.

8. A state power project is not entitled to exemption from annual charges, under § 10(e) of the Federal Power Act, 16 USCA § 803(e), on sales of power for resale without a showing that the power is resold to the consuming public without profit, even though the district may show that it has not earned a net income or profit, p. 269.

Water, § 20.4 — Licensed power project — Exemption from annual charges — State power district — Power sale for municipal use.

9. A state power district is not entitled to exemption from annual charges, under § 10(e) of the Federal Power Act, 16 USCA § 803(e) on the ground that, since it is authorized to sell power, sales which it makes to other parties either for resale or for use constitute a "municipal use" within the contemplation of the second part of the exemption clause of § 10(e), p. 269.

Water, § 20.4 — Licensed power project — Exemption from annual charges — State power district.

10. A state power district is not entitled to exemption from annual charges, under § 10(e) of the Federal Power Act, 16 USCA § 803(e), where it has not shown that any power from its project has been sold "to the public without profit" and has not shown that it used any of the power "for state or municipal purposes," p. 269.

(OLDS, Chairman, and SACHSE, Commissioner, dissent.)

By the COMMISSION: The Central Nebraska Public Power and Irrigation District has applied for exemption from payment for 1942 and 1943 of annual charges due under the Federal Power Commission license for its Kingsley Project on the Platte river and its tributaries in Nebraska upon the grounds, among others, (1) that the power generated at that project was sold to the public without profit, and (2) that the power was used for municipal purposes. Under § 10(e) of the Federal Power Act, 16 USCA § 803(e), where a municipal licensee shows that the power was sold to the public without profit or that it used

the power for municipal purposes, the exemption should be granted.[1]

The facts, as agreed upon, show that District is operated jointly with Loup River Public Power District and Platte Valley Public Power and Irrigation District (both licensees under the Federal Power Act). Most of the electric energy generated at the three plants is disposed of through a noncorporate agency called "Nebraska Public Power System" ("System"). An operating agreement entered into by the three Districts provides for interconnection of the three power plants, pooling of the electric energy generated and its sale by System. After payment of its own operating expenses System distributes the revenues to the three Districts in accordance with prescribed formulae. In 1942 and 1943, the years covered by the claims for exemption, System sold power to Consumers Public Power District, North Loup District, various rural public power districts, cooperatives, municipalities, and Nebraska Power Company; all these purchases being for purpose of resale. System also sold a relatively small amount of power to a number of defense plants. As a result of these operations, District reported as net income for 1942 the amount of $106,320.01 after payment of operating expenses, depreciation, and all income charges, including interest on its funded debt. For 1943, it reported a net income above expenses of $263,905.53.[2] District did not show any sales at or below cost during either year.

[1, 2] While the Federal Power Act authorizes exemption to the extent that power generated by a municipal licensee is sold to the public without profit, the act does not define what is meant by the sale of power "without profit." According to universal understanding of the meaning of the words, there is a profit if, for a given period, the revenues exceed the properly allocated costs. Providence Rubber Co. v. Goodyear (1870) 9 Wall (76 US) 788, 804, 19 L ed 566. Nothing in the legislative history of the exemption clause of § 10(e) shows that Congress intended a concept of municipal profit differing in any respect from that generally accepted.[3] The fact that Congress allowed the

[1] Section 10(e) provides: "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part . . . *Provided further*, That licenses for the development, transmission, or distribution of power by states or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such state or municipality for state or municipal purposes, except that as to projects constructed or to be constructed by states or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; . . . but in no case shall a license be issued free of charge for the development and utilization of power created by any government dam and that the amount charged therefor in any license shall be such as determined by the Commission. . . ."

[2] We accept licensee's statement of revenues and expenses for present purposes but reserve the right to make a more thorough study, if that should be necessary, when such accounts become pertinent for other purposes.

[3] The legislative history of § 10(e) is quite extensive, and the particular provision we are here concerned with was incorporated into H. R. 3184 (subsequently enacted as the Federal Water Power Act of 1920) as Senate Amendment No. 37 and was accepted by the House conferees without discussion, House Report 910, 66th Congress, 2d Session (1920). Chairman Esch of the House conferees reported that under the bill "no charge is levied upon a municipality or any other governmental agency or the state itself for power developed by dams constructed by such state or municipality, and when the power is for

exemption on sales to the public only "to the extent" that power is sold without profit shows that on sales "with profit" the exemption cannot be granted.

[3] The District seeks to wrap itself in the cloak of governmental immunity by claiming that, since it is acting as an agency of the state of Nebraska, it cannot make a profit. This strange and novel doctrine that, because a municipal power system is conducted for the public benefit, there can be no public profit, is an obvious confusion of the terms "public benefit" and "public profit." There is no inherent prohibition against an enterprise conducted for the public benefit earning a profit. When a power plant is constructed and operated by a public agency, we assume that there will be a public benefit. The question which we must consider, however, is whether from its power operations there is "profit" within the statutory exemption clause.

As the United States Supreme Court reminded the state of New York recently:

"When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the Federal government is concerned. New York v. United States (1946) — US —, 90 L ed —, 66 S Ct 310, 313."

The fallacy of District's contention is evident from an examination of the laws governing and results flowing from its own operations and from an examination of basic principles relating to municipal operations generally. District tries to bolster its argument that as a public agency it cannot make a profit by citation to its Enabling Act [4] wherein it is limited in the use of its power revenues to payment of operating expenses, retirement of indebtedness for power facilities, and construction of extensions of those facilities. This limitation is also recognized in the operating agreement with the other two Nebraska districts (Loup River District and Platte Valley District) and in the trust indenture securing the loan of some $21,590,000 from the United States. We are aware that while District earned excess income during both 1942 and 1943 it did not actually retire any bonds during either year, merely setting such excess income aside for future bond redemption or for other purposes.

The limitation which the Nebraska law places on the *disposition* of profits, or on use of income above operating expenses, does not establish that a public power district organized thereunder cannot make a profit. On the contrary, District's Enabling Act clearly contemplates that the public power districts therein authorized should be profit-making governmental enterprises in the ordinary sense of the term. Section 70–713 of that act

public utility purposes and not sold for profit. The only source of the charge would be upon the agency, private in its character, which furnished power to public utilities or for its own use." (59 Cong. Rec. 6524, 66th Cong. 2d Sess.) In the same debates Congressman Lee of Georgia (commenting on Amendment No. 37) said that "no charges are made for licenses to these agencies in so far as the power developed is sold to the public without profit or is used for state or municipal purposes." (59 Cong. Rec. 6527, 66th Cong. 2d Sess.)

[4] Nebr. Comp. Stat. Supp. (1941) Chap 70, Art 7, as amended by Laws of 1943, Chaps 145 and 146.

requires that the electric power rates shall be "so adjusted as . . . to confer upon . . . the users and consumers . . . the benefits of a successful and profitable operation and conduct of the business of the district." Section 70–709 dealing with the power to borrow or incur indebtedness prescribes that such indebtedness "shall be payable solely (1) from revenues, income, receipts, and profits derived by the district from its operation and management . . . ," whereas § 70–712 limiting hypothecation of property, specifically authorizes the pledging of "revenues, incomes, receipts, or profits to secure the payment of indebtedness to the Federal government."

The licensing portion of the Federal Power Act carries many provisions giving state and municipal power developments preferential treatment—a clear recognition by Congress of the *public benefits* to be obtained through public ownership of power facilities. But nowhere in the statute is there any intimation that Congress regarded a municipal power development as incapable of earning a *profit*. Had the Congress so intended, it could easily have said that, regardless of profit on sales, all municipal licensees should be exempt from payment of annual charges. The very exemption clause with which we are dealing is itself conclusive proof that Congress considered that sales to the public from municipal projects would either be with profit or without profit. However much the Commission might desire to favor municipalities by relieving them of license charges, the decision not to do so except under specified conditions has already been made by Congress. It remains for Congress to change the statute if any change is desired.

[4] Automatic exemption from payment of all annual charges is provided in another basis for exemption carried in § 10(e) (not involved in the present claims) whereby licenses for state or municipal projects "primarily designed to provide or improve navigation" shall be issued without charge. As we mention later, a state or municipality is granted an exemption on power which it uses. If, as argued by District, its municipal power sales are to the public and are always without profit, the use exemption and the sales exemption combined would give a municipal licensee automatic exemption from payment of annual charges and make the navigation exemption unnecessary and superfluous. But it is well settled that a legislative body is presumed to have used no superfluous words in a statute (Platt v. Union P. R. Co. [1879] 99 US 48, 58, 25 L ed 424) and we are required to give effect to "every clause and part of a statute." Ginsberg & Sons v. Popkin (1932) 285 US 204, 208, 76 L ed 704, 52 S Ct 322.

[5] Cumulative support to the conclusion that District is a profit-making enterprise is found in the authorization for construction of additions and extensions out of excess revenues, as set forth in Art VI of the Operating Agreement with the other two districts, added by amendment of March 5, 1943, and in certain provisions of the trust indenture. The construction of extensions from revenues has long been regarded as the use of profits. Grant v. Hartford, & N. H. R. Co. (1876) 93 US 225, 23 L ed 878.

[6] In effect, District would have us consider the repayment of its power investment as an expense in producing the power which it sells.[5] It is true that a municipality is put to expense in building a power plant and that ordinarily it must raise the construction money by issuing revenue or tax bonds. But the construction of any power plant calls for an expenditure of capital, whether the owner be a public agency, an individual, or a private corporation. Neither this Commission nor any other regulatory agency would allow, as part of the expense in producing the power sold, a double return to investors of the cost of a private power plant through both a depreciation allowance and through amortization of principal. Having permitted this public agency to deduct a depreciation charge as an expense, there is no reason why we should also allow it to treat the repayment of its capital investment as a further and duplicate expense. As a matter of fundamental principle, such a repayment of capital investment can only be made from profit.

The reduction of the indebtedness against the property by payment of the principal of the bonds outstanding out of earnings can only be regarded as profit. Newport News v. Warwick (1932) 159 Va 571, 166 SE 570, 578.

See decisions of other courts to like effect: Boonville v. Maltbie (1936) 272 NY 40, 15 PUR(NS) 376, 4 NE2d 209, 212; Carta v. Norwalk (1929) 108 Conn 697, 145 Atl 158, 160; Zangerle v. Cleveland (1945) 145 Ohio St 347, 61 NE2d 720.

[7] Apparently some question has been raised in connection with the System of Accounts prescribed by this Commission for licensees and public utilities as to its applicability to the power operations of municipal licensees. A system of accounts is merely a means of classifying costs, receipts, and expenditures, and otherwise keeping orderly track of financial affairs connected with the operation of any business activity and there is little justification for different accounting treatment of identical operations. The only modifications of the general System of Accounts found necessary for municipal licensees are a few minor adaptations (not applicable to the accounts of this District nor of importance here) to make the accounts suitable to the operations of the electric department of a municipality where the electric department is not synonymous with the municipality. Under our System of Accounts, with or without the minor adaptations referred to, there is a distinct separation of the revenues and expenses in municipal power operations to the same degree

[5] Under paragraph A of § 11.24 of our regulations pertaining to exemption of municipalities from the payment of annual charges, such a licensee may show that the revenues from the sale of power do not exceed the project operating expenses plus payment of interest on indebtedness. Among the items listed as *expense deductions* appears "amortization." That is, there may be included among the expense deductions the amortization of those amounts which for one reason or another have been deferred to be carried forward to a future period. For example, operating expenses would include amortization of debt discount and expense, amortization of premium on debt, amortization of prepaid rent, amortization of improvements to leased premises where such improvements are to remain upon the expiration of the lease, or amortization of limited term interests in lands. However, under no circumstances should this be interpreted to include the amortization of principal, especially as an added expense on top of the allowance already made for depreciation.

as in private power company operations and a similar determination of net income.

Furthermore, those agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public are required by § 303 of the act, 16 USCA § 825 b, to conform to our accounting requirements for licensees and public utilities. Although these Federal agencies are not licensees under the act, there is no difference in the accounting treatment of their costs, revenues, and expenses and the treatment prescribed for and followed by public utility companies and licensees particularly in so far as concerns the determination of net income.

[8] There is one final aspect of the profit question to which we should refer. This concerns the profit on resales by those purchasers who did not buy power for their own use. As we have said, most of the power purchased from System was bought in wholesale quantities for resale at retail to consumers. Even if District had shown that it had not earned a net income or profit each year, we would not be authorized to allow the present claims for exemption on its sales for resale without a showing that the power was resold to the consuming public without profit. Although in an earlier order in this case, we denied District's application for exemption because of its failure to show that power was being *resold* without profit, thereby putting District on notice of the importance we attach to such a showing, the present record is devoid of any evidence on that point.

[9] As a further ground for exemption, District argues that, since it is authorized to sell power, the "sales" which it made to other parties either for resale or for use constitute a "municipal use" within the contemplation of the second part of the exemption clause of § 10(e). Section 10(e) authorizes the exemption "to the extent" that power from a state or municipal project "is sold to the public without profit or is used by such state or municipality for state or municipal purposes."

If the claim of District that the "sale" of power, being a "municipal purpose," entitles it to the exemption, the alternative grounds for exemption in § 10(e) would overlap and conflict, for the first ground limits the exemption to sales to the public without profit, and the second, under District's argument, allows the exemption for all sales irrespective of profit. We cannot attribute such a purpose to the statute, but rather are of the opinion that Congress intended that the two grounds of exemption should be mutually exclusive and that claims for exemption predicated on sales of the energy must meet the further condition that the power must reach the consumer without profit having been made on any sales. Moreover, the reference in the second ground for exemption to a use "by such state or municipality" clearly is a reference back to the state or municipal licensee operating the project and limits the exemption to instances where such licensee retains the power and *uses* it for its own purposes. Such retention and use by a municipal licensee precludes disposition to others.

Conclusion

[10] We are here asked to reverse

the practice which has been previously followed by the Commission, and no convincing reason has been advanced to show that heretofore we have been in error. For the reasons which we have set forth at length above we are of the opinion that District has not shown that any of the power from Project No. 1417 was sold in 1942 or 1943 "to the public without profit." Nor has it shown that it used any of the power "for state or municipal purposes." Failing to support its claims for exemption upon either ground, District has not shown that it is entitled to any exemption from payment of annual charges authorized in the statute. It is unnecessary to pass upon the other questions raised.[6]

An appropriate order will be entered in accordance with this opinion.

OLDS, Chairman, dissenting: I must dissent from the majority decision in this matter because I believe it places a strained interpretation upon § 10(e) of the act, 16 USCA § 803 (e). This interpretation assumes that Congress intended an unworkable requirement as the basis for claims by state and municipal licensees for exemption from the license charges otherwise required by the act.

I am convinced that there is a simple interpretation of the language of § 10 (e) which is entirely in accord with the purposes of the act. This would exempt Central Nebraska from payment of annual charges for its Kingsley project to the extent that the power developed thereby is sold to consumers through agencies not operated for private profit.

In taking this position I realize that I am departing from a line of Commission decisions in which we have consistently held that the earning by a state or municipal licensee of annual revenues, in excess of operating expenses and fixed charges, was enough to subject such licensee to the same license charges as would be assessed against a private corporation operated for profit. I also recognize that the past action of the Commission appears in general accord with § 11.24 of its Rules of Practice and Regulations.

But in this connection I would call attention to one case in which the Commission seems to have recognized that treatment of such excess state or municipal power revenues on an annual basis as profits within the meaning of § 10(e), totally ignoring its past or future operations, might be arbitrary and unworkable. I refer to the 1939 order in the Crisp county, Georgia, Case.

The Crisp county undertaking, after some years of operation at a loss, had finally emerged in 1937 with an inconsequential surplus. The question before the Commission was whether this surplus rendered the county liable to a license charge. After trying for some time to reconcile the facts in this

[6] In its brief in support of its applications for exemption, District also attacks the constitutionality of the annual charge on the grounds, inter alia, that Congress failed to prescribe a standard for fixing the charges, that fixing of the charge is a legislative function which may not be delegated to an administrative agency and that the charge constitutes a tax on a state agency. We do not consider these contentions since "it is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress." Re East Ohio Gas Co. (1939) 1 FPC 586, 592, 28 PUR(NS) 129; Re Mississippi River Fuel Corp. (1940) 2 FPC 170, 175, 34 PUR(NS) 8; cf Todd v. Securities and Exchange Commission (1943) 137 F2d 475, 476.

case with its interpretation of the congressional intent, the Commission finally exempted the Crisp county project from that year's charges on the finding that:

"The licensee has submitted satisfactory evidence that the power generated by the project during the year ended December 31, 1937, was sold to the public *substantially* without profit."

The record shows that the Commission recognized the impracticability of the requirement that, to be entitled to the exemption from charges purportedly provided by Congress, power from a state or municipal project must be sold in such a way that the revenues for any single year would exactly cover the costs without a cent to spare. For it considered at some length amending its rule to conform with the finding that power "was sold to the public substantially without profit." Recommendations were made that a 2 per cent, or 3 per cent, or even 5 per cent excess might be established as coming within the phrase. But the amendment was never adopted.

The discussion of the matter, however, reveals the impracticability of the Commission's theory of the congressional intent. Let us consider for a moment this question of practicability in terms of the case before us.

The project of Central Nebraska is interconnected and operated jointly with the licensed projects of Loup River Public Power District and the Platte Valley Public Power and Irrigation District. The joint operating agreement provides for the pooling and sale of all power generated by the three projects through a noncorporate operating agency called the Nebraska Public Power System. The revenues received by the operating agency are distributed among the three districts in accordance with formulae prescribed in the joint operating agreement. In 1942 and 1943, the years covered by the applications for exemption, the operating agency sold power to Consumers Public Power District, North Loup District, various rural public power districts, municipalities and to Nebraska Power Company, all of which purchased the power for resale. The operating agency also sold power to a number of defense plants which consumed the energy. As a result of these operations, Central Nebraska received a relatively small amount of excess revenues for the years 1942 and 1943, after payment of expenses for each of those years.

Central Nebraska, I believe, rightly urges that the law requires an absurd and impossible thing if it contemplates that a state or municipal agency's revenues each year should exactly balance its costs for it to be exempt from annual licensed project charges. In other words the Congress should not be presumed to have prescribed something which runs counter to the sound conduct of the public business of selling power.

The District correctly points out that sale of power at wholesale must be under relatively long-term contracts. It then asks consideration of the hypothesis that the districts could plan their business program with such exactness for one year in advance, taking into account all known factors, that they would end up the year with no accumulated surplus or loss. It points out that the slightest change in anticipated water supply, a break in a canal

or reservoir, a breakdown in a power plant, or a sudden change in market conditions would upset all calculations and would throw the districts into the red at the end of the year.

"Such a method of operation," Central Nebraska urges, "would be absolute folly, yet it is the only method that these districts or any other municipality could follow and be exempt from the 'annual charges' under the law if the Commission's interpretation of the law is correct that an excess in one year of revenues over expenses is a profit and that a municipality accumulating such excess sells power to the public at a profit."

"Such an interpretation," it continues, "places a premium on a method of operation that can only lead to insolvency and disaster for those who attempt to operate under it and it penalizes the successful, businesslike operator."

The majority recognize that, in the instant case, the districts are required by the law under which they operate to return any excess revenues to the public either in lower rates or in better service. In other words, any accumulation of excess earnings can be used only for the benefit of the public business from which they are derived. Under such circumstances such excess earnings cannot be considered a profit as the term is understood and used in the business world.

As stated by the District, Congress could have no motive for penalizing a municipality just because its receipts exceeded its revenues in any one year, when such benefits are to be returned to the public from whence they came, unless it intended that the public in any event should pay charges, in which case it would not have provided for any exemptions. There is no question but that any charge assessed by the Commission under the circumstances of this case, except to the extent that the power is sold to the public through an agency operated for profit, will reduce by that much the benefit the public will derive from use of its resources.

I am convinced that when Congress provided that such agencies should be exempt from charges, "to the extent such power is sold to the public without profit," it intended the phrase "without profit" to mean "not for profit" rather than "not at a profit" in the strict accounting sense of the phrase. Only this interpretation is consistent with the assumption that Congress intended to a practical rather than an impractical thing. Only this interpretation is consistent with the purpose and context of the act itself, *i.e.*, the purpose to conserve the value of such resources for the people and the context which grants a preferential position to state and municipal developers to conserve that purpose.

To hold, in the case of state or municipal projects, that Congress intended to apply the concept of profit as "excess of revenues over expenses" prevailing in private enterprise, would be to lose sight of the very real distinction between the purposes of public and private enterprise. It would be to treat as identical gain which inures to private use from private enterprise created and existing only *for profit*, and a temporary gain that accrues to a state or municipal enterprise to be used ultimately only for the benefit of the people or community served.

As applied to privately owned enterprise "profit" is the taking of gain from the pockets of the public and transferring it to the pockets of a relatively few individuals who are organized to serve the public for the express purpose of reaping gain for their own use. Their objective is the maximum possible gain even though the result may limit the general use of the country's resources.

Applied to a state or municipal undertaking operated for a public purpose, however, this concept is meaningless for, no matter how such gain is received, surplus from municipal or state operations is merely a temporary taking it from one pocket of the public to put it into the other pocket. The motive to divert the greatest possible surplus from the public, with possible resulting cramping of maximum use of the service, is entirely lacking.

This distinction was clearly set forth by two of the country's greatest jurists in decisions of the United States Supreme Court dealing with efforts of certain private utility companies to bring two municipal utilities under laws applying to private undertakings.

In delivering the opinion of the court, sustaining the decision of the supreme court of Illinois holding the city of Springfield free from regulation of rates by the Illinois Commerce Commission, Mr. Justice Holmes stated in part:

"The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the equal protection of the laws. But we agree with the supreme court of the state that the difference between the two types of corporation warrants the different treatment that they have received.

"The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must." Springfield Gas & E. Co. v. Springfield, 257 US 66, 66 L ed 131, PUR 1922A 576, 577, 42 S Ct 24.

Similarly, in Puget Sound Power & Light Co. v. Seattle (1934) 291 US 619, 624, 78 L ed 1025, 54 S Ct 542, where the constitutionality of a gross revenue tax, imposed by the city of Seattle upon a competing private business, was involved, Mr. Justice Stone said:

"The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains, if any, must be used for public ends."

In other words, regardless of the amount of excess revenues in any

given year, a state or municipality does not make a profit as that term is generally understood. It may be presumed that Congress had in mind the term *profit* as generally understood. Therefore, in the absence of something other than the use of the word *profit* it seems unlikely that Congress intended the charging of a license fee to states or municipalities based on the mere realization of annual net earnings.

Similarly, in the use of the words, "sold to the public," it may be presumed that Congress had in mind the use of the phrase as generally understood, *i.e.*, sales to ultimate consumers. In other words it was directed at the ultimate power transaction with the public in cases in which the state or municipal licensee sold the power to some other distributing agency. The nature of the ultimate transaction with the public was the thing with which Congress was concerned, *i.e.*, whether the public was getting the full benefit of power created by the streams over which Congress had control, rather than whether the state or municipality conducted its electric operations on the impossible basis of having neither annual gains nor annual losses.

If, therefore, the transaction, from the point of generation to the ultimate consumers, involves no sales for profit, *i.e.*, involving the profit motive, Congress intended the licensee to enjoy exemption from annual charges. Since sales to the public by a state or municipality cannot be regarded as profit-making transactions, it follows that the sales (portions of the power generated at such state or municipal project) which were not intended to come within the exemption were those, if any, made by some intervening agency operated *for* profit.

This construction would disregard annual income and base the exemption solely upon whether the ultimate power transaction with the public was through a profit or nonprofit making agency. Excluded from the exemption would be all sales at wholesale to a profit making distributing agency, whether with or without excess earnings. Sales at wholesale to coöperatives and other municipalities or states would enjoy the exemption—all sales at retail to the public would be exempt also. Sales at retail to the Federal government, state government, and other political subdivisions would be exempt also on the theory that when a municipality holds itself out to serve the public, any consumer at retail would come within the meaning of "public."

This construction, as already suggested, is in harmony with the purposes of the act. The Federal Power Act concerns itself with the conservation and utilization of waters over which Congress has control, for the benefit of the people of the various states. The purpose of imposing a charge was to provide compensation to the public for the utilization of those waters where the public was not getting the full benefit thereof. (59th Cong. R. 1429–1433.)

Where electricity is used for municipal purposes, the people are receiving the benefit of the stream, and the purpose to be achieved in charging a fee is not present. This is irrespective of whether the energy is supplied above or below cost. Complete exemption is provided in this case. Likewise, when a licensed project is

operated by a municipality and the power publicly distributed to the people, the people receive the benefit and the reason for the charge is again lacking. Also, if the energy were distributed by another political subdivision of the state or a coöperative, even though in the operation there may arise a surplus—the benefit from the stream still enures to the people.

However, it seems to follow that if a municipal licensee sells energy from that same stream to a private agency which in turn sells it to the public for the purpose of making a private profit on the sale, the purpose to be achieved by assessing the charge would be present, for the public under those circumstances does not get the full benefit of the energy created. Thus the underlying purpose of the act in making the charge would be carried out if the interpretation is given the questioned clause, "to the extent such power is distributed to the public through an agency not operating for profit."

The legislative history of § 10(e) is relatively scant and is of limited help in determining the congressional intent, in so far as the phrase "sold without profit" is concerned. So far as it goes, however, it supports the interpretation, set forth above, that state and municipal projects were to be exempt from annual charges except to the extent that their power is sold to consumers through agencies operated "for profit."

The extended debate on a Senate Committee amendment, which limited the license charges to each licensee's share of the cost of administering the act, made it clear that the Senators were interested in making sure the benefits from water powers should flow to the people rather than to private capital. And the debate makes it clear that a majority felt it was for the states to distribute this value either by levying a rental charge or by assuring the advantage to consumers through lower rates.

Thus Senator Nelson, of Minnesota, who was managing the committee amendment [1] on the floor, said on January 12, 1920:

"We provide in this amendment that all expenses which the Federal government incurs in connection with water-power development constructed by *private capital* shall be reimbursed to the Federal government . . . . Beyond that we leave the property of the state to the state, with authority in the state to determine whether a charge shall be imposed or a reduction of rates effected. . . . The Federal government is not giving away its property; it is simply consenting that the people of the several states may use their own without paying tribute to the Federal government." (Italics supplied.)

This language, from the spokesman of the Senate Committee, strongly suggests that Congress had in mind levying a charge only where private capital was accorded the right to develop the country's water powers and

[1] This committee amendment, which was strongly opposed by Senator Lenroot of Wisconsin, in effect limited the license charges, to be assessed by the Commission, to the amounts necessary to recover the cost of administering the act. Lenroot argued that, where there was no way of otherwise assuring the public the full benefit from such water-power development, the Commission should be authorized to assess more than what he termed "a nominal charge." In such circumstances, he contended, the committee amendment would mean "a clear gift to the water power corporations."

that it intended to leave the states free to decide how the benefits from water-power development could be best assured to the public. The Senate approved the amendment.

At the time of this debate, § 10(e) exempted states and municipalities from the annual charge only to the extent that the power was used for state or municipal purposes. After various suggested amendments designed to provide wider exemption, Senator Sterling, of South Dakota, proposed the present language as an amendment which was adopted by the Senate without debate on January 14, 1920.

Then, after the bill had been returned from conference, Representative Esch, Chairman of the House Committee on Interstate and Foreign Commerce, used the following significant language in commenting upon the amendment:

"Under the provisions of this bill no charge is levied upon a municipality or any other governmental agency or the state itself for power developed by dams constructed by such state or municipality, and when the power is for public utility purposes and not sold *for* profit. The only source of a charge would be upon the agency, private in its character, which furnished power to public utilities or for its own use." (Italics supplied.) Cong. Rec. May 4, 1920.

Thus it appears clear that in the final stages of the bill, which became the original Federal Water Power Act, the chairman of the responsible House Committee officially interpreted "sold without profit" to mean "not sold for profit" and clearly indicated that the license charge is to be made only on that portion of the power which reaches the public through a private profit making agency. This is consistent with the views expressed by Senator Nelson on behalf of the Senate Committee. In the absence of anything more authoritative to the contrary, Chairman Esch's interpretation, reinforcing that of Senator Nelson, should be controlling.

The application of this interpretation of § 10(e) of the act will be simple and practical. It will be in complete conformity with the basis on which the Commission assesses annual licensed project charges, which are fixed at so much per hundred horsepower of capacity and per thousand kilowatt hours of energy generated during the preceding fiscal year. Such public agencies as Central Nebraska Power and Irrigation District would be liable to annual charges only on that portion of the capacity and energy sold to a utility corporation organized and operated to resell such power to the public for profit.

The record of Commission action in such cases shows that public undertakings have qualified for full exemption from license project charges under the Commission's interpretation of § 10 (e) of the act only by selling no power or operating in the red. This appears to me the reductio ad absurdum of the present interpretation of the congressional intent.

SACHSE, Commissioner (concurring in the dissent): I join in Commissioner Olds' dissent. The clear purpose and intent of the several provisions of the Federal Power Act making a distinction between privately owned and operated electric plants, on the one hand, and publicly owned

and operated plants, on the other, convinces me that license charges under § 10(e) of the act, 16 USCA § 803 (e), are not to be collected from a state or municipality when the benefit of the public enterprise accrues exclusively to such state or municipality.

The root of the conflict of opinion between the majority and the minority in this case is found, I think, in the majority's disinclination to give recognition to the basic and factual differences between the ownership and business of a private utility operated for the private profit of its owners, and the ownership and operation of a publicly owned and operated utility conducted for the public benefit and not operated for private gain. Section 10 (e) of the Federal Power Act, it is true, does not in detail define this difference between private profit and public benefit.[1] I believe that is the task of this Commission, an expert agency, to note and give consideration to the effect of these essential differences.

Whether any business operates at a profit or at a loss over a given period of time can be determined only by an analysis of its operations and financial transactions in accordance with a sound and appropriate accounting system. Such an accounting system must reflect the actual conditions of construction, operation and all other aspects of the business and cannot produce correct results if it ignores the actualities. The accounting system prescribed by the Commission for electric utilities was principally designed to fit the financial and operating facts and conditions of private electric plants under our jurisdiction and was not intended to apply unmodified to publicly owned and operated electric utilities.[2]

Obviously the conditions and circumstances pertaining to the people's investment in Nebraska's publicly owned and operated electric plant place this investment in a category different from a private investment. Under Nebraska law the outstanding debt secured by the public plant is subject to requirements different from requirements applying to private investment. The private investment, reflected in the rate base, is never fully amortized. The private rate base is always present, irrespective of whether it is repre-

[1] "Section 10(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the government of excessive profits until the respective states shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require; . . . *Provided further*, That licenses for the development, transmission or distribution of power by states or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such state or municipality for state or municipal purposes, except that as to projects constructed or to be constructed by states or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; . . . "

[2] Section 303 of the Federal Power Act, 16 USCA § 825b, provides that: "All agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public shall be subject, as to all facilities used for such generation and sale, and as to the electric energy sold by such agency, to the provisions of §§ 301 and 302 hereof, *so far as may be practicable*, . . ." (Italics supplied.)

Sections 301 and 302 are the accounting and depreciation sections of the act.

sented by bonds or by stock ownership. That private rate base is entitled to earn a fair return under just and reasonable rates. In the Nebraska plant, as in many other publicly owned plants, the amortization of the investment and the ultimate complete elimination of the corresponding rate base as a basis of continuing charges against the consumer-ratepayers, is one of the principal objectives of public ownership and operation. The Nebraska law requires such amortization of the original cost capital. As this cost is paid off, the debt and the fixed charges against the public property grow correspondingly less. When the cost is fully amortized such charges cease, the cost of supplying electric energy decreases and investment is no longer a burden on the consumers. This amortization of such public debt is a proper charge against the ratepayers of the publicly owned utility. I am unable to find in § 10, or anywhere else in the Federal Power Act, a mandate requiring us to ignore these facts and differentiations.

The difference, I think, is also recognized in our Rules of Practice and Regulations, effective June 1, 1938. Part 11 of these rules, dealing with license charges under § 10 of the Federal Power Act, makes provision for exemption of states and municipalities.

In this case our task is to ascertain whether the Nebraska property is operated for a "profit" within the meaning and purpose of the Federal Power Act and the applicable Nebraska statutes and whether it is subject to the payment of a license fee to the Federal government, similar to a private electric utility. The majority proceeds as if the Nebraska plant were a private plant operated for private gain. That obviously is contrary to the undisputed facts.[8]

The record shows that the total

[8] By stipulation the operating results for the years 1942 and 1943 were placed in the record. The same method of calculation is used for both years and, in the interest of brevity, only the 1943 figures are here shown:

1943

(1) Total Operating Revenues		$1,325,642.23
(2) Operating Expenses and Other Deductions:		
(a) Production Expenses	$155,364.31	
(b) Transmission Expenses	301,547.99	
(c) Sales Promotion Expenses	8,967.48	
(d) Administrative and General Expenses	113,671.69	
(e) Depreciation	272,978.72	
(f) Taxes	8,494.32	
(g) Interest on Long-Term Debt	78,608.65	
(h) Amortization of Debt Discount and Expense	22,764.96	
(i) Irrigation Operation and Expense	99,338.58	
(j) Total		$1,061,736.70
(3) Balance of Revenue (Net Revenue) Set Aside Under Terms of Trust Indentures for Subsequent Payment of Bonded Indebtedness		$263,905.53

Attention is called to Items (2)(g) and (3). Item (2)(g), it will be noted, is considered as part of "Operating Expenses and Other Deductions." In the Accounting System applied to private electric public utilities, any interest payments on long-term debt would be considered as part of the "fair return," and not as an operating expense. In Nebraska's operations, this item is treated as a deduction from operating revenues and not as part of "profit." Item (3), amounting to $263,905.53 in 1943, is considered as "profit." The record is clear, however, that this balance of revenue must be used exclusively for payment of amortization of indebtedness and, consequently, for purposes of reduction and ultimate elimination of the total debt.

revenues from the sale of power of this project are expended solely for the public benefit and for no other purpose. It is my conclusion that under the provisions of the Federal Power Act and our Rules of Practice and Regulations, this publicly owned and operated property is lawfully exempt from the payment of an annual license fee.

ORDER

Upon consideration of applications filed by Central Nebraska Public Power and Irrigation District for exemption from payment of annual charges due under the license for Project No. 1417 for the calendar years 1942 and 1943; the orders of February 15, 1944, and August 15, 1944, denying exemption for the years 1942 and 1943 respectively; applications for rehearing on and reversal of said orders filed by the licensee; the record upon such rehearings and briefs filed thereon; and

The Commission having carefully considered all evidence offered and arguments advanced by the licensee and having on this date adopted and entered its Opinion No. 136, which is hereby referred to and made a part hereof by reference, *finds* that:

(1) The licensee reports that during the calendar years 1942 and 1943 it earned net incomes of $106,320.01 and $263,905.53, respectively, after payment of operating expenses and provision for interest, depreciation and accrual for bond redemption premiums; the licensee's figures in support of these net incomes are accepted for present purposes but will be subject to further examination if required for other purposes;

(2) These net incomes shown by the licensee for 1942 and 1943 were realized by selling the power from Project No. 1417 with profit during these years. Moreover, these sales were largely made to other parties for resale, and the licensee has not satisfactorily shown that such resales were to the public without profit;

(3) The licensee has not shown that the electric power generated during 1942 and 1943 at Project No. 1417 was sold to the public without profit and therefore has not shown that it is entitled to exemption from payment of annual charges upon the ground that such power was "sold to the public without profit" as authorized in § 10(e) of the Federal Power Act and by the terms of its license;

(4) The sales of electric power generated at Project No. 1417 during 1942 and 1943 to other parties do not constitute a use of such power by the licensee for state or municipal purposes. Moreover, the licensee has not shown to what extent, if any, that power generated during 1942 and 1943 at Project No. 1417 was used for state or municipal purposes, and therefore, it has not shown that it is entitled to exemption from payment of annual charges for those years upon the ground that such power was "used by such state or municipality for state or municipal purposes" as authorized in § 10(e) of the Federal Power Act and by the terms of its license;

It is *ordered* that:

(A) The Commission's orders of February 15, 1944, and August 15, 1944, denying licensee exemption from payment of annual charges for the calendar years 1942 and 1943 respectively, be and they are hereby reaffirmed

and the licensee's applications for reversal of such orders are denied;

(B) Annual charges for the calendar year 1942 in the amount of $3,922.15 and for the calendar year 1943 in the amount of $7,344.10 shall be paid within thirty days from the date of receipt of a copy of this order.

SECURITIES AND EXCHANGE COMMISSION

Re Oklahoma Gas & Electric Company

File No. 70-1229, Release No. 6449
March 5, 1946

APPLICATION *by subsidiary operating company for authority to issue and sell preferred stock to be exchanged for outstanding preferred stock, for exemption from competitive bidding provisions of Rule U-50, and for authority to issue and sell serial notes to commercial banks but not for resale to the public; authority granted.*

Security issues, § 112 — Exemption from competitive bidding — Exchange of securities.

1. The issuance and exchange of new preferred stock for outstanding preferred stock of a subsidiary company operating in two states was exempted from the competitive bidding requirements of Rule U-50 where the issuance was the subject of informal discussions with the staff of the Commission prior to the formulation of the Commission's policy requiring preferred stock issues under the Holding Company Act to be submitted to competitive bidding whether or not they involved exchange offers, and where issuance had been approved by one of the state Commissions as to accounting entries and had been approved by the other state Commission, p. 286.

Security issues, § 132 — Scope of proceeding — Exchange of preferred stock plan.

2. The Commission, in passing upon the proposed issuance and exchange of new preferred stock for old preferred stock of a subsidiary operating company, need not determine whether the proposed issuance of common stock by the company to finance the retirement of serial notes being issued in connection with the exchange plan will produce more or less than the amount needed for retirement of the serial notes, although approval of the exchange plan was stated to be in reliance upon the company's assurance that it would issue a substantial block of additional common stock within the relatively near future, p. 287.

Dividends, § 6 — Rescission of dividend restriction — Debt ratio factor.

3. A dividend restriction, originally imposed in connection with a subsidiary operating company's serial note financing to facilitate the writing off of substantial acquisition adjustments included in the company's property account, was not allowed to be rescinded notwithstanding that the purpose

of the restriction had been served, where the issuance of new serial notes would result in a substantial increase in the company's present debt ratios, although such ratios were to be improved as soon as new common stock was issued, at which time the Commission would entertain favorably the proposal to rescind the dividend restriction, p. 288.

Accounting, § 21 — Amortization of redemption premium.

4. The premium paid by a subsidiary operating company upon redemption of old preferred stock being exchanged for new preferred stock was authorized to be charged to Account 146, Other Deferred Debits, and to be amortized by nine equal annual charges to earned surplus, p. 289.

Security issues, § 5 — Retirement and redemption of stock — Holding company regulation.

5. The acquisition, retirement, and redemption by a subsidiary operating company of its presently outstanding preferred stock are subject to the provisions of § 12(c) of the Holding Company Act, 15 USCA § 79*l*(c), and Rule U–42 thereunder, p. 290.

Security issues, § 13.2 — Exemption from Holding Company Act.

6. The issuance and sale of preferred stock by a subsidiary operating company, and of new serial notes pursuant to an exchange plan, are not exempt from § 6(a) of the Holding Company Act, 15 USCA § 79f(a), and must meet the requirements of § 7 of the act, 15 USCA § 79g, and Rule U–50 thereunder, since they are not subject to approval of any state Commission of the state in which the company is organized and operating, p. 290.

APPEARANCES: A. Louis Flynn, Chicago, by J. R. Clerkin, for Oklahoma Gas and Electric Company; Guggenheimer & Untermeyer, by Alfred Berman, for certain $7 and $6 prior preference stockholders and $4 preferred stockholders of Standard Gas and Electric Company; Edward V. Ahern, for the Public Utilities Division of the Commission.

By the COMMISSION: Oklahoma Gas and Electric Company (OG & E), a public utility subsidiary of Standard Gas and Electric Company (Standard Gas) a registered holding company,[1] has filed an application and declaration and amendments thereto pursuant to the applicable provisions of the Public Utility Holding Company Act of 1935.

OG & E proposes to issue 675,000 shares of new 4 per cent preferred stock (new preferred) having a par value of $20 per share. The company proposes to offer the shares of new preferred to the holders of the 146,478 shares of presently outstanding 7 per cent preferred stock (old preferred) with a par value of $100 per share on an exchange basis. The first 112,500 shares of old preferred stock which are tendered for exchange will receive the 675,000 shares of new preferred stock on the basis of 6 shares of new preferred stock for each one share of old preferred stock. The remaining 33,-

[1] Standard Gas is a subsidiary of Standard Power and Light Corporation, also a registered holding company. Standard Gas owns all of the presently outstanding 750,000 shares of common stock of OG&E. The Commission, by order dated August 8, 1941, directed Standard Gas to dispose of its interest in OG&E.

978 shares of old preferred stock not exchanged will be redeemed in cash, at their redemption price of $125 per share (an aggregate of $4,247,250) plus accrued dividends to date of redemption.

The company requests that the issue and exchange of the new preferred stock be exempted from the competitive bidding provisions of Rule U-50, and that it be authorized to enter into a contract with a group of security dealers to act as dealer-managers in the solicitation of acceptances of the new preferred by the holders of the old preferred.

OG & E also proposes to issue and sell to commercial banks, and not for resale to the public, $9,075,000 principal amount of serial notes, at an interest rate of 1⅞ per cent payable over a period of seven and one-half years, and to apply the proceeds from the sale of such notes, together with treasury funds of the company, to the redemption of the 33,978 unexchanged shares of old preferred stock and the prepayment of presently outstanding serial notes aggregating $4,875,000.[2]

In connection with the proposed transactions, OG & E requests an order of the Commission nullifying an undertaking entered into by the company and approved by the Commission on October 28, 1943,[3] regarding a restriction on the payment of dividends on capital stock of the company.

After appropriate notice public hearings were held. Counsel for certain prior preference and preferred stockholders of Standard Gas appeared and was granted limited participation in the proceedings; such counsel entered objections to the proposed transactions which the Commission has considered and which are discussed hereafter. The Commission, having considered the record, makes the following findings:

OG & E, an Oklahoma Corporation, is an operating electric public utility company engaged in the production, transmission, distribution, and sale of electricity in the states of Oklahoma and Arkansas. The company furnishes retail electric service in 223 communities and contiguous rural and suburban territory in Oklahoma and western Arkansas, and serves electric energy at wholesale for resale in 14 communities in those states, and to 13 rural electric coöperatives. Of the total communities served, 214 are located in Oklahoma and 23 in Arkansas. For the twelve months ended October 31, 1945, approximately 92.2 per cent of the gross operating revenues was derived from sales in Oklahoma and approximately 7.8 per cent from sales in Arkansas.

OG & E is subject to the jurisdiction of The Corporation Commission of the state of Oklahoma, the Public Service Commission of the state of

[2] The company states that it contemplates the issuance and sale of 140,000 additional shares of common stock, at a later date, in connection with the contemplated sale by Standard Gas of 750,000 shares of common stock of OG&E which are owned by the latter company. It is contemplated that the proposed issuance and sale will be made pursuant to the competitive bidding provisions of Rule U-50, and that the transactions will be subject to the approval of this Commission and other regulatory authorities having jurisdiction. The company contemplates that the serial notes now proposed to be issued will be redeemed at the time such common stock is issued. As hereinafter stated, objections were made at the hearing to the amount of common stock so proposed to be issued and the Commission does not at this time pass upon the number of shares to be issued.

[3] Re Oklahoma Gas & E. Co. Holding Company Act Release No. 4649.

Arkansas and the Federal Power Commission. The Corporation Commission of Oklahoma, which does not have jurisdiction over the issue and sale of securities, has approved certain phases of these transactions. The Public Service Commission of Arkansas which has jurisdiction over the issue and sale of securities has approved the proposed transactions.

Condensed balance sheets of OG & E as of October 31, 1945, per books and pro forma, reflecting the proposed transactions are attached hereto as Appendix I. The property and plan of OG & E aggregating $70,287,084 is stated at original cost. Pursuant to orders of the Federal Power Commission and state regulatory bodies, OG & E is in the process of amortizing a balance of $4,086,175 remaining in Account 100.5, Electric Plant Acquisition Adjustments, at the rate of $26,533.61 per month. In January, 1946, the company charged to Earned Surplus the balance of $1,643,137 remaining in Account 107, Electric Plant Adjustments.

The reserve for retirements amounting to $8,201,384 represents 11.7 per cent of total property and plant excluding the above-mentioned amounts in adjustment accounts.

Pertinent ratios of securities to the security base on actual and pro forma bases are shown below:

TABLE 1

	Per Books Oct. 31, 1945	Pro Forma Reflecting Redemption of 7% Preferred, Issuance of 4% Preferred, Prepayment of Present Serial Notes, and Issuance of Serial Notes of $9,075,000	Pro Forma Reflecting Redemption of 7% Preferred, Issuance of 4% Preferred, Refinancing of Serial Notes of $4,875,000 and Issuance of 140,000 Shares of Common Stock [1]
Ratio of Funded Debt to Net Property and Plant:			
(a) Including amounts in Acct. 100.5	52.9%	52.9%	52.9%
(b) Excluding amounts in Acct. 100.5	56.3%	56.3%	56.3%
Ratio of Long-term Debt to Total Net Assets:			
(a) Including amounts in Acct. 100.5	59.7%	66.3%	60.0%
(b) Excluding amounts in Acct. 100.5	63.6%	70.6%	63.9%
Ratio of Long-term Debt and Preferred Stock to Total Net Assets:			
(a) Including amounts in Acct. 100.5	81.6%	86.6%	80.3%
(b) Excluding amounts in Acct. 100.5	86.9%	92.3%	85.6%

[1] See footnote 2, page 282.

The capitalization and surplus of OG & E as of October 31, 1945, per books adjusted to reflect the above-mentioned charge to earned surplus of $1,643,137 in January, 1946, and pro forma on the same basis to reflect the proposed transactions, are shown in the following table:

TABLE 2

	Per Books October 31, 1945		Pro Forma Reflecting Redemption of 7% Preferred, Issuance of 4% Preferred, Prepayment of Present Serial Notes, and Issuance of Serial Notes of $9,075,000		Pro Forma Reflecting Redemption of 7% Preferred, Issuance of 4% Preferred, Refinancing of Serial Notes of $4,875,000 and Issuance of 140,000 Shares of Common Stock [1]	
	Amount	Per cent	Amount	Per cent	Amount	Per cent
Long-Term Debt:						
2¾% First Mortgage Bonds, due 1975	$35,000,000	49.9@	$35,000,000	47.9%	$35,000,000	47.9%
Serial Notes, 2¼% and 2¾%	4,875,000[2]	6.9	—	—	—	—
Proposed Serial Notes, 1¼%	—	—	9,075,000	12.5	4,875,000	6.7
Total Long-term Debt	$39,875,000	56.8%	$44,075,000	60.4%	$39,875,000	54.6%
Preferred Stock:						
7%, Par Value $100, 146,478 Shares Outstanding	$14,647,800	20.9%	—	—	—	—
New 4%, Par Value $20 675,000 Shares Outstanding	—	—	$13,500,000	18.5%	$13,500,000	18.5%
Total Preferred Stock	$14,647,800	20.9%	$13,500,000	18.5%	$13,500,000	18.5%
Common Stock and Surplus:						
Common Stock, $20 Par Value	$15,000,000	21.4%	$15,000,000	20.5%	$17,800,000	24.4%
Premium on Capital Stock	—	—	—	—	1,428,500	1.9
Earned Surplus [3]	612,907	.9	442,016	.6	434,719	.6
Total Common Stock and Surplus	$15,612,907	22.3%	$15,442,016	21.1%	$19,663,219	26.9%
Total Capitalization and Surplus	$70,135,707	100.0%	$73,017,016	100.0%	$73,038,219	100.0%

[1] See footnote 2, page 282. The figures given in the table for "common stock" and "premium on capital stock" are based on the company's assumption as to expected proceeds from the sale of additional common stock and were used by it in presenting pro forma financial statements. These figures have been used above solely for illustrative purposes based upon the company's assumptions.

[2] Includes instalment of serial notes due May 1946.

[3] Adjusted to reflect write-off of $1,643,137 of Plant Adjustments Account 107 by charge to Earned Surplus in January, 1946.

Attached hereto as Appendix II [omitted herein] are condensed statement of income for the twelve months ended October 31, 1945, per books and pro forma, reflecting the proposed transactions. It should be noted that the income statements have not been adjusted to reflect the position of the company with respect to Federal income tax rates effective in 1946.

The New Preferred Stock

The company proposes to amend its Articles of Incorporation to provide for the reclassification of shares of 6 per cent cumulative preferred stock (which are authorized but not issued)

into shares of 4 per cent cumulative preferred stock divided into 870,605 shares of the par value of $20 each of which 675,000 shares will be issued in connection with the proposed transactions. The new preferred stock will be cumulative as to dividends, and is redeemable at $21 per share on or prior to December 31, 1956, and at $20 per share thereafter, plus accrued dividends.

The amended Articles of Incorporation of OG & E contain certain provisions for the protection of the new preferred stockholders which provisions will take effect upon the redemption or retirement of the old preferred stock. These provisions include the right to elect a majority of the board of directors in the event of certain dividend defaults; limitation on the issuance of unsecured debt without consent of the preferred stockholders; and other provisions which we deem appropriate. Furthermore, the articles provide that no dividends on common stock shall be paid in an amount which would exceed 50 per cent of the net income of the company for the period described, if the ratio of the sum of the capital represented by the Common Stock and Surplus Accounts to the sum of the total Capital and Surplus Accounts, as defined and adjusted, would be less than 20 per cent; if such ratio shall be 20 per cent or more, but less than 25 per cent, no common stock dividend shall be declared or paid in an amount which together with all other common stock dividends declared in the year ending on (and including) the date of the declaration of such common stock dividend would in the aggregate exceed 75 per cent of the net income of the company for the period described; and if such ratio shall be in excess of 25 per cent no common stock dividend shall be declared or paid which would reduce such ratio to less than 25 per cent, except to the extent permitted, as described above.

Exchange Offer

The company, as previously stated, will offer to exchange new preferred stock in connection with the redemption of its outstanding old preferred stock. The exchange offer will be on the basis of 6 shares of new preferred for 1 share of old preferred. It will be limited to the holders of 112,500 shares of old preferred who first deposit their shares for exchange within the time period designated by the company which expires on March 25, 1946, unless that time is extended by the company. The offer of exchange will be mailed to each old preferred stockholder together with a form for exercising the Optional Right of Exchange and a copy of the Prospectus. In order to equalize as far as possible the opportunity of stockholders, residing in different parts of the country, to obtain the new stock, it is understood that the company proposes to mail the offer to stockholders at staggered dates, dependent upon their distance from the mailing point. The offer of exchange is conditioned upon the acceptance of such offer by the holders of 112,500 shares of old preferred, which condition may be waived by the company. The deposit of shares of old preferred stock in accordance with the tenor of the exchange offer is irrevocable. Certificates of deposit and certificates for shares of the new preferred stock shall be issued to the old preferred stockholders who

have accepted the offer of exchange.

The balance (33,978 shares) of the unexchanged shares of old preferred stock will be called for redemption at their redemption price of $125 per share plus accrued dividends to the date of redemption.

Requested Exemption from Competitive Bidding

[1] The company has requested that the issue and exchange of the new preferred stock be exempt from the provisions of Rule U-50.

Rule U-50 expresses the Commission's general policy under the Holding Company Act that, subject to limited exceptions, all public sales of securities be conducted after competitive bidding. In the past the Commission has granted exemptions for various preferred stock issues involving exchange. However, in discussing a proposed preferred stock financing and exchanges in the recent case of Re Cincinnati Gas & E. Co. Holding Company Act Release No. 6120, Oct. 5, 1945, the Commission said:

"Because of the large volume of preferred stock transactions which have been proposed and the relative novelty of many of the problems presented, we have thought it appropriate to give reasonably wide latitude to issuers in determining the precise form of their transactions, so long as no major difficulties appeared under the standards of the act. On the basis of experience gathered through this policy we may well find it appropriate to limit more narrowly the methods of preferred refinancing to be employed in future cases. Thus our present decision and other decisions relating to preferred stock refinancing in this period should not be taken as establishing general precedents for the future."

The Commission has, since the above decision, given considerable study to the general problem of competitive bidding on preferred stock issues. The Commission is now of the view that, as a matter of future policy, preferred stock issues under the Holding Company Act should ordinarily be submitted to competitive bidding whether or not they involve exchange offers.[4]

However, the present issue was the subject of informal discussions with the staff of the Commission prior to the formulation of the above policy. The proposals have been approved by the Oklahoma State Commission as to the accounting entries, and the issuance of the securities has been submitted to and approved by the Arkansas State Commission. Under all the circumstances of this case, and without considering this matter as any precedent in future cases, we will grant the exemption from the requirements of Rule U-50.

Dealer-manager Contract

The selection of the dealer-manager was made after a discussion with eight investment banking houses, four of which submitted proposals. The company selected the proposal of the firm of Merrill, Lynch, Pierce, Fenner & Beane as the proposal which would afford it the lowest possible cost. The dealer-manager contract provides that the group may be composed of mem-

[4] See, for example, Re Northern Indiana Pub. Service Co. (1944) Holding Company Act Release No. 5031, 53 PUR(NS) 193; Re New York Power & Light Corp. Holding Company Act Release No. 5763, April 27, 1945; Re Potomac Edison Co. Holding Company Act Release No. 6362, Jan. 9, 1946.

bers of the National Association of Security Dealers, Inc., and shall include all such members with offices in the states of Oklahoma and Arkansas desiring to participate. The dealer-manager may also participate as a member of the group.

If the exchange offer is successful, the company agrees to pay the dealer-manager a manager's fee in the amount of $1,800, and in addition will pay a dealer's commission to members of the group for shares deposited for exchange through the solicitation of such dealers. The dealer-manager shall be entitled to a dealer's commission on all deposits solicited by it. The aggregate dealer's commission payable with respect to all shares deposited, as to which one or more dealers shall have solicited such deposit, shall be the aggregate arrived at according to the following schedule:

For each holder of 1 to 5 shares inclusive	$3.00 per holder
For each holder of 6 to 10 shares inclusive	3.50 per holder
For each holder of 11 to 25 shares inclusive	4.00 per holder
For each holder of 26 to 50 shares inclusive	10.00 per holder
For each holder of 51 to 100 shares inclusive	15.00 per holder
For each holder of 101 to 200 shares inclusive	20.00 per holder
For each holder of 201 to 300 shares inclusive	30.00 per holder
For each holder of 301 to 400 shares inclusive	40.00 per holder
For each holder of 401 to 500 shares inclusive	50.00 per holder
For each holder of over 500 shares	60.00 per holder

The aggregate cost for the exchange, if completely consummated, has been estimated at $31,526 or an average of 28 cents per share of old preferred stock being exchanged.

The company also agrees to pay to the dealer-manager, whether or not the exchange offer is successful, the out-of-pocket expenses incurred by the dealer-manager not exceeding $2,500; and a fee of $2,500 (plus out-of-pocket disbursements) to the firm of Gardner, Carton and Douglas, as independent counsel for the dealer-manager.

Issuance of New Serial Notes

In connection with the issuance and sale of the proposed additional serial notes, in the aggregate amount of $4,200,000, the company's existing loan agreement and its presently outstanding serial notes aggregating $4,875,000, maturing serially to 1953, with an average interest rate of 2.526 per cent per annum, will be canceled and paid and replaced by a new loan agreement and serial notes in the principal amount of $9,075,000. The new serial notes will be payable over a period of seven and one-half years at an interest rate of 1¾ per cent payable semiannually. The issuance of these notes will result in a lower interest rate and ultimately a substantial saving to the company.

Contemplated Issuance of Additional Common Stock

[2] OG & E, in its declaration, has stated that it proposes to sell 140,000 shares of additional common stock at the same time that Standard Gas and Electric Company sells at public sale its holdings of common stock of OG & E. It proposes that funds received by OG & E from the sale of this common stock will be used to retire the $4,200,000 of serial notes being issued at this time. The preferred stockholders of Standard Gas and Electric Company who have appeared at this hearing have objected to one

aspect of the proposed common stock issue. Briefly they take the position that the value of common stock of the Oklahoma Company is such that, at least on the current market, a sale of 140,000 shares of common stock would bring a sum of between $5,000,000 and $6,000,000, and that, in their opinion, any such sale should be limited to such amount of shares as may be necessary to produce the sum of $4,200,000.

We express no opinion as to the value of the common stock of the Oklahoma Company. Whether the sale of 140,000 shares would produce more or less than $4,200,000, at the time of such sale, obviously cannot and need not be determined at this time. Even if the position of the objecting stockholders is correct, and substantially more than $4,200,000 were realized from the sale of such stock, it may well be that such sale should be made in order to improve the security structure of this company and permit the retirement of additional serial notes now outstanding. However, we do not at this time express any opinion with respect to the number of shares of common stock which should then be sold. That matter will be fully considered when application is made to issue such shares. At that time, the stockholders of Standard who have now objected will have a full opportunity to be heard, and the matter may be considered and decided on the basis of the facts as they then appear.

Although we do not at this time pass upon the exact number of shares of common stock which should be issued, it should be clearly understood that our approval of the present financing under the standards of § 7 is in reliance upon the company's assurance that it will issue a substantial block of additional common stock within the relatively near future. Absent such issue of new common stock, the company's debt is substantially increased, with a consequent detriment to the soundness of its security structure.[5] We are permitting the issue of the debt at this time solely as a temporary expedient in order that the preferred stock exchange may be promptly effected.

Request to Modify Dividend Restriction

[3] As part of the proposed transactions, the company desires to modify a dividend restriction undertaken in 1943 in connection with its serial note financing (approved by this Commission by order dated October 28, 1943, File No. 70–800). At the time of that proceeding, the Federal Power Commission had not passed upon the company's accounts with respect to original cost of property. It was known that substantial acquisition adjustments were included in the company's property account, and to facilitate writing off such amounts the company agreed to a dividend restriction for a 10-year period commencing September 1, 1943, which, in substance, restricted earned surplus at the rate of $450,000 per annum, less any amounts by which the Utility Plant Account shall have been amortized subsequent to that date.

Subsequent to the foregoing proceedings, the Federal Power Commission completed its examination of the company's original cost studies, and

[5] See Tables on pages 283 and 284, showing increased debt ratios after present note issue.

directed the amortization of plant acquisition adjustments, at the rate of $318,403 annually. Accordingly, the company now takes the position that the purpose of the 1943 dividend restriction has been served, and that it should therefore be permitted to rescind its former undertaking.

There is considerable merit in the argument that, since provision has now been made for amortization of the plant acquisition adjustments, no further dividend restriction need be retained. However, as indicated above, the issue of the new serial notes results in a substantial increase in the company's present debt ratios, although such ratios will be improved as soon as the new common stock is issued. Accordingly, we deem this an inappropriate time to permit the company to rescind any existing dividend restrictions. However, when application is made to issue the new common stock, we shall entertain favorably the proposal to rescind this dividend restriction.

Accounting Treatment of Premium Paid upon Redemption of Old Preferred

[4] In connection with the redemption of the outstanding old preferred, OG & E will incur the following charges in the estimated aggregate amount of $3,188,950: (a) $25 per share on each share of old preferred redeemed, (b) an amount equal to $20 per share[6] on each share of old preferred exchanged for new preferred, and (c) estimated expenses incurred in the redemption and exchange of the old preferred and the issuance of the new preferred stocks. The earned surplus account of OG & E is inadequate to absorb a charge in the amount of $3,188,950 at the present time. OG & E proposes to charge the full amount to Account 146, Other Deferred Debits, and to amortize it by nine equal annual charges to earned surplus of approximately $357,000.

The company's treasurer testified that the net saving effected by the lower dividend rate on the new preferred to be outstanding, after adjustment of Federal surtaxes, will amount to $407,691 per annum. However, he also pointed out that as a related part of this financing it is proposed to issue and sell additional shares of common stock in the near future in substitution for the additional amount of serial notes now being issued. He also testified that if the net savings are computed by allowing for dividends on such additional common stock at the present annual rate of payment aggregating $186,667,[7] they will be reduced to $221,024 per annum.

This Commission's general policy on amortization of redemption premium has been stated in Accounting Release No. 45 (dated June 21, 1943). In the present case, the Oklahoma Corporation Commission, which has jurisdiction over the accounts of this company, has approved the proposed amortization program. The Federal Power Commission, which also has jurisdiction over the accounting entries, has not yet passed upon the proposed program. While we consider the period of amortization to be

[6] This item represents the excess of the aggregate of the par value of the shares of new preferred issued over the aggregate par value of that portion of old preferred exchanged.

[7] Estimated for this purpose at 140,000 shares; see footnote 2, page 282.

somewhat long, we recognize that special circumstances exist in this case, particularly the extraordinarily high redemption premium of $25 per share. Accordingly, we will permit the proposed transactions to be consummated. However, our action is not intended to restrict or otherwise affect the jurisdiction of the Federal Power Commission or other regulatory agencies which may have occasion to pass upon the accounts of this company.

Fees and Expenses

The fees and expenses, estimated by the company, to be incurred in connection with the issuance and distribution of the new 4 per cent preferred stock are as follows:

Registration fee under Securities Act of 1933	$1,406
Dealer-manager fees and dealers' commissions	25,000
Registrar's fees	4,500
Fees of depositaries	2,500
Accounting services and expenses	2,500
Legal services	11,500
Public Utility Engineering and Service Corporation services:	
Transfer agent	5,000
Other	2,000
Printing	10,000
Engraving definitive stock certificates and printing temporary stock certificates	1,500
Printing certificates of deposit	600
State qualification fees	2,500
Mailing and postage expense	5,000
Miscellaneous, including traveling, telephone and telegraph, stationery, and other out-of-pocket items	3,500
Total	$77,506

The fees and expenses, estimated by the company in connection with the issue and sale of the serial notes are as follows:

Printing serial notes and loan agreement	$1,000
Legal services	3,500
Miscellaneous	2,500
	$7,000

Such fees and expenses, which include the payment for legal services of $2,500 to the firm of Gardner, Carton & Douglas of Chicago, Illinois, as independent counsel for the dealer-manager, $7,500 to the firm of A. Louis Flynn of Chicago, Illinois, and $5,000 to the firm of Rainey, Flynn, Green and Anderson of Oklahoma City, Oklahoma, as counsel for the company, if within the foregoing estimates, do not appear unreasonable.

Compliance with the act

[5, 6] The acquisition, retirement, and redemption by OG & E of its presently outstanding 7 per cent cumulative preferred stock (old preferred) are subject to the provisions of § 12 (c) of the act, 15 USCA § 79*l* (c), and Rule U–42 thereunder. We observe no basis for adverse findings with respect thereto.

Since the issuance of the new 4 per cent cumulative preferred stock and the new serial notes are not subject to approval of any state Commission of the state in which OG & E is organized and doing business, the issuance and sale of these securities are not exempt from the provisions of § 6 (a) of the act, 15 USCA § 79f(a), and must meet the requirements of § 7 of the act, 15 USCA § 79g and Rule U–50.

The issuance of the new 4 per cent cumulative preferred stock is for the purpose of exchanging such stock for the outstanding old 7 per cent preferred stock of OG & E and the financing of its business and, therefore, meets the requirements of clauses (A) and (B) of § 7 (c) (2) of the act. The issuance of the certificates of deposit and certificates for the new 4 per cent preferred stock, being for the same purpose, also meets the requirements

of clauses (A) and (B) of § 7(c)(2). No state Commission has informed us that any state laws applicable to any of the transactions have not been complied with. The issuance and exchange of these securities meets the requirements of §§ 7(c)(2) and (g) of the act, and we observe no basis for adverse findings under § 7(d). We do not find it necessary to impose any conditions under § 7(f). The request of the company that the issuance and exchange of the new preferred stock be exempt from the provisions of Rule U–50, for the reasons previously stated, will be granted.

The issue and sale of the new serial notes is for the purpose of financing the business of the company and, therefore, meets the requirements of § 7(c)(2)(B). Section 7(g) being complied with, we observe no reason for making adverse findings under § 7 (d) or for the imposition of any conditions regarding the issue and sale of such notes. Under the provisions of subdivision (a)(2) of Rule U–50, their issuance and sale are exempt from the competitive bidding requirements of Rule U–50.

The proposed amendments to the Articles of Incorporation, in so far as they affect the rights of the holders of outstanding common stock, are subject to the provisions of § 6(a)(2) and § 7(e) of the act. As a result of such changes, it does not appear that there will be any unfair or inequitable distribution of voting power among the security holders of OG & E. Therefore, no adverse findings are required under said sections of the act.

For the reasons previously stated, no action will be taken at this time on the company's request that it be permitted to rescind and nullify the dividend restriction agreement heretofore entered into in 1943 by the company, without prejudice to the renewal of that request at the time application is made to issue the new common stock.

ARKANSAS SUPREME COURT

Arkansas-Louisiana Electric Cooperative, Incorporated

v.

Arkansas Public Service Commission et al.

No. 4-7883
— Ark —, 194 SW2d 673
May 13, 1946; rehearing denied June 17, 1946

APPEAL *from judgment affirming Commission order finding foreign electric coöperative corporation to be a public utility; reversed and remanded with directions. Rehearing denied June 17, 1946.*

Corporations, § 20 — Powers of foreign corporation.

1. A foreign corporation admitted to do business in the state is subject to the same regulations, limitations, and liabilities as like corporations of the state and shall exercise no greater powers than may be exercised by like domestic corporations, p. 295.

Corporations, § 20 — Powers of foreign corporation — Similarity to domestic corporation.

2. A corporation organized under the Louisiana Electric Cooperative Act, which is similar to the Arkansas Electric Cooperative Corporation Act, both of which were presumably passed pursuant to the provisions of the Federal Rural Electrification Act of 1936 is a "like corporation" to an Arkansas coöperative created under the Arkansas Electric Cooperative Corporation Act and, therefore, subject to the same regulations, limitations, and liabilities as the latter coöperative with no greater powers than the latter company, p. 295.

Public utilities, § 21 — Test of status — Charter powers — Utility activities.

3. A foreign corporation actually engaged as a public utility in the state cannot escape Commission regulation merely because the charter powers it is permitted to exercise in the state may indicate a different status, since what a company does rather than what it, or the state, says it is determines its status, p. 298.

Public utilities, § 24 — Status of contract service.

4. The furnishing of electric power to one customer under a private contract does not constitute the furnishing agency a public utility, p. 298.

Public utilities, § 59 — Status of foreign coöperative association — Service to single nonmember.

5. That a foreign electric coöperative furnished electricity to a Federal agency pursuant to contract under a virtual directive of a Federal war

agency did not render the coöperative a public utility, particularly where the coöperative had not held itself out as willing to serve the public generally, p. 298.

Mutual companies, § 3 — Right to membership — Foreign coöperative corporation.

6. Domestic rural electric coöperatives, not expressly being denied the right to do so, may become members of a like foreign membership corporation entering the state to do business, p. 299.

(SMITH, J., dissents.)

APPEARANCES: Sherrill, Cockrill & Wills, of Little Rock, for appellant; P. A. Lasley, of Little Rock, for appellee.

MILLWEE, J.: The question for determination is whether appellant, Arkansas-Louisiana Electric Cooperative, Inc., is a public utility and, therefore, subject to regulation and supervision by the Arkansas Public Service Commission.

The Department of Public Utilities was created as a separate department of the Arkansas Corporation Commission by Act 324 of 1935, and the two agencies were consolidated as the Arkansas Public Service Commission by Act 40 of 1945. The agency existed as the "Department of Public Utilities" when the instant proceedings were determined by that body, and appellee, Arkansas Public Service Commission, will be hereinafter referred to as "Department," and appellant will be designated "Ark-La."

A brief history of the proceedings leading to the present controversy seems appropriate. Ark-La is a Louisiana corporation organized under Act No. 266 of the Louisiana Statutes for 1940, which provides for the creation, operation, and regulation of electric coöperatives in that state. On August 8, 1941, Ark-La secured authority from the secretary of state to transact business in this state as a foreign corporation, after complying with the provisions of § 2247 of Pope's Digest. In its application for such authority, Ark-La stated that it was a nonprofit corporation organized for the purpose of producing, transmitting, and selling electric power on a nonprofit basis.

On December 26, 1941, Ark-La filed its petition with the Department alleging it was "a nonprofit electric coöperative corporation composed of five Arkansas rural electric coöperatives and five Louisiana rural electric coöperatives," and had a contract to supply 32,500-kilowatt capacity of electricity to the aluminum plant to be built by the Defense Plant Corporation near Lake Catherine, Arkansas. The petition prayed that the Department authorize the construction and operation by Ark-La of, (1) a transmission line from the aluminum plant site near Lake Catherine to the Arkansas-Oklahoma line near Fort Smith, Arkansas; (2) a steam generating plant of 45,000-kilowatt capacity on the Ouachita river; (3) transmission lines to interconnect the proposed steam generating plant with a similar plant to be built by the Defense Plant Corporation and to interconnect with the transmission line from Grand river dam; and (4) all other transmission lines necessary to serve electric power to rural electric coöperatives that are members of Ark-La.

Two of the present utility appellees intervened in opposition to the Ark-

La application. After a hearing, the Department withheld authority to construct a generating plant and lines extending therefrom to the aluminum plant. Authority to construct and operate transmission lines necessary to serve electric power to the rural electric coöperative members of Ark-La was denied, but without prejudice to the right to renew such application whenever the applicant was in position to furnish more accurate information as to the facilities it planned to construct and the service it proposed to furnish. A certificate of convenience and necessity to construct and operate the transmission line from the aluminum plant site to the Oklahoma line near Forth Smith, Arkansas was granted. [See Re Ark-La Electric Cooperative (Ark 1942) 42 PUR (NS) 112.] The opinion of the Department clearly indicates that this certificate was granted against its own judgment, and under a virtual directive from those Federal agencies charged with the production of materials vital to the prosecution of the war and the national defense. The opposing utilities did not appeal from the order of the Department granting the certificate of convenience and necessity, and Ark-La has not renewed its application for a certificate to serve its own rural coöperative members. The transmission line was constructed and the defense plant was being served by Ark-La when the instant proceedings were instituted.

On December 7, 1943, appellees, Arkansas-Missouri Power Corporation, Southwestern Gas and Electric Company, Arkansas Power and Light Company, and Oklahoma Gas and Electric Company, all public utilities operating in this state, filed their complaint with the Department under § 17(a) of Act 324 of 1935, § 2080 (a), Pope's Digest, alleging that Ark-La was doing business in the state of Arkansas as a public utility and, therefore, subject to regulations by the Department under Act 324 of 1935, *supra*. The utilities prayed that the Department require Ark-La to comply with the terms of the act and that it be subjected to complete regulation by the Deparment.

Ark-La filed its answer and motion to dismiss contending that the utility appellees were unauthorized to complain to the Department, and that the issues raised by the complaint were beyond the jurisdiction of the Department to determine. Ark-La also contended that it was a coöperative nonprofit, membership corporation and not subject to regulation by the Department; that it served only the Defense Plant Corporation, one of its members, and contemplated service to its rural coöperative members when materials became available; and was not operating as a public utility.

After a hearing on November 23, 1944 a majority of the Commissioners, with Chairman Hathcoat dissenting, issued an order in which Ark-La was found to be a public utility, subject to jurisdiction of the Department, and was directed to comply with the regulatory provisions of Act 324 of 1935. Pursuant to the provisions of § 2097 of Pope's Digest, Ark-La filed its petition in the Pulaski circuit court to review and vacate the order of the Department. This appeal is prosecuted from the judgment of the circuit court affirming the order of the Department.

In determining whether the Department has regularly pursued its authority in fixing the status of Ark-La as that of a public utility, it will be necessary to consider the extent of Ark-La's corporate powers while operating as a foreign corporation in this state. Act 266 of the state of Louisiana for 1940, under which Ark-La was organized, is designated by § 30 as the "Electric Cooperative Act." The act is entitled in part, "An act relating to coöperative, nonprofit, membership corporations organized to engage in electrification. . . ." The act contains many identical and similar provisions to be found in our Act 342 of 1937 which is designated as the "Electric Cooperative Corporation Act," and is entitled "An Act Relating to Cooperative, Nonprofit, Membership Corporations Organized to Engage in Rural Electrification."

It cannot be denied that the powers granted Ark-La while operating in the state of Louisiana under Act 266, *supra,* are somewhat broader than those extended to rural electric coöperatives organized in this state under Act 342. Under the Arkansas act a coöperative may serve its members only, while under the Louisiana act, power is granted the coöperative to serve, in addition to its members, governmental agencies, political subdivisions and "other persons not in excess of 10 per centum of the number of its members." The field of operation of a coöperative organized under the Louisiana act is not specifically confined to rural areas as is the case of a coöperative organized under our Act 342, which defines a rural area as any area not included within the boundaries of any city or town with a population of more than 2500.

[1, 2] The appellees, to sustain the order of the Department, earnestly insist that when Ark-La entered this state as a foreign corporation, it brought with it all the charter powers granted it by the state of Louisiana, and that there is nothing in either our laws, or policy, to prevent the exercise of such powers in this state. If appellees are correct in this contention, and Ark-La has the power to serve nonmembers and nonrural areas in this state, a right denied a coöperative by our statute, then the determination of Ark-La's status as a public utility by the Department must be upheld.

The rule generally applicable is stated in 23 Am Jur, Foreign Corporations, § 91, as follows: "Although the organic power of a foreign corporation depends upon the law of the state from which its existence is derived, in the exercise of such power in another jurisdiction the corporation must conform to the local laws and public policy. The validity and effect of its acts in states other than the state of incorporation, even though such acts are within its charter, must depend upon the law of the jurisdiction in which such exercise takes place and in which such acts are done. Its submission to do business within the state is not by right, but by comity only, and it is, in respect of business done within the state, generally subject to, and bound by, the local laws and unable to exercise powers or perform acts, whether authorized by its charter or not, which are contrary thereto." A similar statement of the rule is found in Fletcher Cyclopedia,

Corporations, Perm Ed, Vol 17, § 8344, as follows: "Corporations coming into a state as a matter of comity become subject to the state's laws, and to the same restrictions and duties as corporations formed in the state. They have no authority to do any act or transact any business which is prohibited to domestic corporations of like character by the Constitution, laws or policy of the state, anything in the charters of the foreign corporations to the contrary notwithstanding. If their charters contain grants of powers not allowed by the laws of such state, the grants will be treated simply as if they had not been made."

We find this rule embodied in the fundamental law of this state. Section 11, Art XII of the Constitution of 1874 is as follows: "Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law. (a) Provided, that no such corporation shall do any business in this state except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations, and liabilities as like corporations of this state (b), and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this state, nor shall they have power to condemn or appropriate private property." In Woodson v. State (1900) 69 Ark 521, 65 SW 465, 468, Mr. Justice Riddick, commenting on this clause of our Constitution, said: "It will be seen from this section of our Constitution that the legislature has no power to give a foreign corporation greater powers, privileges, or franchises than may be exercised by like domestic corporations." This court has construed this section to mean what it plainly says, and a foreign corporation admitted to do business in this state is subject to the same regulations, limitations, and liabilities as like corporations of this state and shall exercise no greater powers than may be exercised by like domestic corporations. Railway Co. v. Gill (1891) 54 Ark 101, 15 SW 18, 11 LRA 452; Western U. Teleg. Co. v. State (1907) 82 Ark 309, 101 SW 748, 12 Ann Cas 82; Pekin Cooperage Co. v. Duty (1919) 140 Ark 135, 215 SW 715.

Is Ark-La a "like corporation" to a coöperative organized under Act 342 of 1937, within the meaning of the aforementioned provision of our Constitution? The Louisiana act, under which Ark-La was organized, and Act 342, *supra*, both provide for the organization of "coöperative, nonprofit, membership corporations." The provisions of the two acts governing the admission, rights, and duties of members of a coöperative are practically identical. Likewise the disposition of corporate revenues and refunds to members on a patronage basis are provided for in both acts. License fees are payable in lieu of other excise taxes, and organizations under each of the acts are exempt from the "Securities Act" on certificates of membership and certain obligations to the Federal government. A careful comparison of the two acts clearly

indicates the same primary purpose of furnishing electric power on a coöperative, nonprofit basis by the corporations organized thereunder. It seems reasonable to assume that both acts were passed pursuant to the provisions of the Federal Rural Electrification Act of 1936, 7 USCA §§ 901–914, which authorized loans in the several states "for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service." Ark-La has borrowed from the Rural Electrification Administration under the provisions of this act and executed its mortgage to the Federal agency in pursuance of the act's provisions.

Before Ark-La was authorized to do business in Arkansas, it filed with the secretary of state its verified certificate together with its articles of incorporation. In this certificate it sought authority to enter this state as "a nonprofit corporaton organized for the purpose of producing, transmitting, and selling electric power on a nonprofit basis"; and it must be assumed that the authorization granted by the secretary of state was responsive to the purpose thus expressed.

By § 25 of the Louisiana act, coöperatives operating thereunder are exempt from the jurisdiction and control of the Public Service Commission of that state. Secton 31 of our Act 342 of 1937 provides: "All corporations organized under this act shall be exempt in any and all respects from the jurisdiction and control of the Department of Public Utilities of this state, except said corporations shall secure from the Department of Public Utilities, before construction or operation is begun, a certificate of convenience and necessity for the construction or operation of any equipment or facilities for supplying electric service in rural areas." In the case of Department of Public Utilities v. McConnell (1939) 198 Ark 502, 30 PUR(NS) 53, 56, 130 SW2d 9, 11, this court held that the Department had no jurisdiction over coöperatives organized under Act 342, *supra*, and it was there said: "What we do decide is that the Department, by express language of the statute, is denied jurisdiction over the coöperatives in questions other than a determination of whether public convenience and necessity will be served in the particular territory or area into which, or throughout which, the applicant proposes to operate."

After a careful consideration of the respective provisions of the two acts, and keeping in mind the common objects and purposes which both seem designed to achieve, it is our conclusion that Ark-La is a like corporation to an Arkansas coöperative created under Act 342 of 1937, within the meaning of § 11 of Art XII of our Constitution. When Ark-La established its business domicile in this state, it became entitled to rights, powers and privileges, the same as, but no greater than, electric coöperatives organized under Act 342 of 1937, except as to the specific constitutional restriction on the power to exercise the right of eminent domain. It is also subject to the same regulations which are imposed on a domestic electric coöperative organized under our statute and is, therefore, exempt from the control and jurisdiction of the Department, except that it must secure a certificate of convenience and neces-

sity from the Department before beginning construction or operation of facilities for supplying service in rural areas.

[3–5] However, despite its restricted powers while operating in this state, a company may, nevertheless, become a public utility by reason of the activities it actually pursues here. If Ark-La is, or has, actually engaged as a public utility, it cannot escape regulation by the Department merely because the charter powers it is permitted to exercise in this state may indicate a different status. There are numerous cases to the effect that it is what a company does that is the important thing, and not what it, or the state, says that it is. See Inland Empire Rural Electrification v. Department of Public Service (1939) 199 Wash 527, 30 PUR(NS) 173, 92 P 2d 258, and cases there cited.

Section 1(d)(1) of Act 324 of 1935 defines the term "public utility" to include "persons and corporations, or their lessees, trustees, and receivers, now or hereafter owning or operating in this state, equipment or facilities for: Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or other agency for the production of light, heat, or power to, or for, the public for compensation." The statute clearly gives the Department jurisdiction and control of those utilities which render service to or for the public for compensation.

The only service thus far performed by Ark-La in this state has been that rendered the Defense Plant Corporation under a certificate of convenience and necessity from the Department. This service was rendered for a year, or more, prior to the time the Defense Plant Corporation became a member of Ark-La. Appellees insist that this service is inconsistent with the idea that Ark-La is operating in this state as a rural electric coöperative for the reason that a coöperative under our act may serve members only, as customers. Conceding, without deciding, that the question whether a corporation is acting ultra vires is one properly to be determined by the Department, has the service rendered to the Defense Plant Corporation, under the circumstances disclosed in this record, resulted in fixing the status of Ark-La as that of a public utility? This service has been rendered pursuant to a private contract between the parties for the avowed purpose of relieving a power shortage created by the stress of war. It was rendered under a virtual directive of an agency of the Federal government clothed with broad wartime powers and acting in a period of grave national emergency. While the service was rendered to a public body, Ark-La was under no obligation other than that imposed by its agreement to furnish the Defense Plant Corporation with electrical energy, and did not thereby hold itself out as willing to serve the public generally.

It is generally held that the furnishing of electric power to one customer under a private contract does not constitute the furnishing agency a public utility. State ex rel. Buchanan County Power Transmission Co. v. Baker, 320 Mo 1146, PUR1929A 106, 9 SW2d 589; Sunset Shingle Co. v. Northwest Electric & Water Works (1922) 118 Wash 416, 203

Pac 978; Colorado Power Co. v. Halderman, PUR1924D 789, 295 Fed 178. In the case of Re Nevada Consolidated Copper Corp. (Ariz 1938) 25 PUR(NS) 319, the Arizona Commission held that the copper company, furnishing power to the United States government temporarily to relieve a power shortage, was not doing a public utility business and was not, therefore, subject to regulation by the Commission as a public utility. We concur in this view, and conclude that Ark-La has not dedicated its property to the use of the public by its contract and service to the Defense Plant Corporation.

The only other undertaking Ark-La has sought permission from the Department to perform is that of serving its five Arkansas rural coöperative members. An application for a certificate of convenience and necessity to construct and operate facilities for this service has thus far been denied, but without prejudice to the right to renew such application when Ark-La is in position to furnish the Department with more definite information concerning the proposal. Ark-La has not seen fit to renew this application. If, and when, a renewal of such application is made, it will be time enough to determine whether the facts and circumstances involved in such proposal would result in the determination of Ark-La's status as that of a public utility, and thus render it subject to jurisdiction and control of the Department. This question is, therefore, premature and not an issue here.

[6] Appellees also argue that rural electric coöperatives organized under Act 342 of 1937 may not become members of Ark-La, and, in support of this contention, cite the following provision contained in Section 12 of said act: "A corporation organized under this act may become a member of another such corporation and may avail itself fully of the facilities and services thereof." It is insisted that this provision of the act precludes a coöperative organized thereunder from becoming a member of a corporation organized under the law of another state. We think this provision of the statute must be considered in the light of the provisions of § 11, Art XII, of our Constitution and the rights accorded like foreign corporations doing business in this state. In the case of Patterson Orchard Co. v. Southwest Arkansas Utilities Corp. (1929) 179 Ark 1029, 18 SW2d 1028, 65 ALR 1446, this court passed upon the question whether a foreign corporation engaged as a public utility in this state had the right to exercise the power of eminent domain. It was there held that such corporation could not exercise this power by reason of the express constitutional restriction of § 11, *supra*. However, it was further held that such corporation might acquire right of way by lease, purchase, or other methods not excepted from the general powers granted under said constitutional provision. The above provision of § 12 of the act contains no express restriction against domestic coöperatives becoming members of other like corporations. Under the rule announced in the Patterson Case, *supra*, coöperatives organized under Act 342, not expressly being denied the right to do so, may become members of a like foreign mem-

bership corporation entering this state to do business.

The record discloses that Ark-La entered a contract with the Rural Electrification Administration under which the latter was obligated to advance Ark-La sufficient funds to enable it to construct facilities in a large number of Arkansas counties. It is insisted that the construction of such facilities could only be for the purpose of serving the public generally in the several counties, and that it is, therefore, Ark-La's purpose to establish an electric empire in competition with privately owned public utilities in this state. If Ark-La entertains the purpose of embarking upon such an ambitious program, that purpose has not been revealed in what it has already done, or declared its intention of doing, in this state. It has only rendered service to the Defense Plant Corporation. It has declared its intention to serve its own coöperative members but, as yet, has failed to renew its application for the necessary authority from the Department to perform this service. We find nothing in its actions or declared intentions so far, that indicates the purpose of making its services available to the public generally.

After careful consideration of the whole record, it is our conclusion that the operations and services of Ark-La thus far fail to bring it within the statutory definition of a public utility subject to the jurisdiction and control of the Department. The judgment of the circuit court affirming the order of the Department of November 23, 1944, is accordingly reversed and the cause remanded with directions to dismiss the complaint of appellees and vacate the order of the Department.

Frank G. Smith, J., dissents.

ILLINOIS SUPREME COURT

People ex rel. Albert A. Sprague et al.

v.

Phillip J. Finnegan, Judge

No. 29340
— Ill —, 66 NE2d 690
March 20, 1946; rehearing denied May 21, 1946

PROCEEDING *for writ of mandamus commanding lower court judge to enter decree in accordance with opinion of supreme court; writ awarded. Rehearing denied May 21, 1946. For earlier court decision see (1945) 390 Ill 537, 61 PUR(NS) 15, 62 NE2d 420.*

PEOPLE EX REL. SPRAGUE v. FINNEGAN

Mandamus, § 19 — Proper parties.

1. The judge of the lower court is properly made the sole respondent in a mandamus proceeding to compel a lower court to enter a decree as directed by the supreme court, p. 302.

Appeal and review, § 70 — Mandate of supreme court — Effect on lower court action.

2. It is the duty of a lower court judge to enter a decree as directed by a mandate of the supreme court, where the latter court's opinion on prior appeal was complete and final in regard to the confiscatory nature of a rapid transit company's rate schedule and the need for a temporary increase in fares, and the opinion did not contemplate a retrial or further taking of evidence, p. 303.

Mandamus, § 2 — Mandate of higher court.

3. Mandamus will lie to compel a judge of a lower court to follow a supreme court mandate giving specific direction for the entry of a decree in accordance with the views expressed and the record as made, where the supreme court's opinion is complete and final, p. 303.

Return, § 50 — Confiscation — Commission duty to increase rates.

4. The Commission is required to proceed without delay to advance a rapid transit company's schedule of fares to such a point as to check any confiscation by providing a return of income sufficient to meet operating expenses, where the supreme court has enjoined the Commission from enforcing the old rates as confiscatory and has left the question of new rates for Commission decision, p. 303.

Return, § 51 — Confiscation.

Statement that a rate of fare which does not produce income return sufficient to meet operating expenses is confiscatory, p. 303.

APPEARANCES: Bell, Boyd & Marshall and Herbert M. Johnson, all of Chicago (Thomas L. Marshall and David A. Watts, both of Chicago, of counsel), for relators; George F. Barrett, Attorney General, and Barnet Hodes, Corporation Counsel, of Chicago (William C. Wines, William H. Sexton, and James J. Danaher, all of Chicago, of counsel), for respondent.

FULTON, J.: At the November term, 1945, of this court, leave was granted Albert A. Sprague and Bernard J. Fallon, trustees of Chicago Rapid Transit Company, as relators, to file a petition for writ of mandamus against Philip J. Finnegan, as judge of the circuit court of Cook county, respondent.

The basis for the petition and the facts leading up to the filing of the same are briefly as follows:

At the May term, 1945, an opinion was filed in this court in the case of Sprague v. Biggs (1945) 390 Ill 537, 61 PUR(NS) 15, 62 NE2d 420, reversing the decree and remanding the cause to the circuit court of Cook county, with directions to enter a decree in accordance with the views expressed in the opinion. The mandate from this court was duly issued on September 21, 1945.

The petition alleges that relators duly presented to the respondent,

Judge Finnegan, a copy of the opinion in said cause, together with the mandate, and also a form of decree which respondent failed or refused to enter.

A short history of the litigation prior to the filing of this original proceeding for mandamus shows the following: In July, 1941, the relators filed with the Illinois Commerce Commission new schedules increasing their rates of fare. The Commission set aside the new schedules pending the hearing of evidence as to rates. On November 5, 1941, the relators filed their petition with the Commission seeking a temporary increase in rates pending the hearing on the new schedule. This application for temporary increase in rates was denied. On June 15, 1942, upon the completion of the hearing, the Commission entered an order fixing $36,000,000 as the rate base of petitioners but denied any increase in rates of fare.

On February 20, 1942, the relators brought suit in the circuit court of Cook county to enjoin the Illinois Commerce Commission and the Attorney General from enforcing the old schedules. The cause was referred to a master in chancery, who took voluminous testimony and filed a report recommending the granting of the relief prayed. The circuit court sustained exceptions to the master's report and entered a decree dismissing the complaint for want of equity. The cause came directly to this court from the entry of that decree, and the case was completely disposed of by this court in Sprague v. Biggs, *supra*, where we reversed the decree and remanded the cause to the circuit court with directions to enter a decree in accordance with the views expressed in the opinion. After the case was remanded to the circuit court of Cook county, on October 11, 1945, it was reinstated by that court and reassigned to the respondent.

After due notice the petitioners presented to the respondent a copy of the opinion in said case, together with the mandate from this court, and a form of decree which provided that the Commission and the Attorney General be enjoined from enforcing the old rates and from interfering with relators charging the proposed higher rates. The respondent refused to enter the decree but permitted the Illinois Commerce Commission to file an amended and supplemental answer and then referred the cause to a master in chancery to take evidence solely on income and operating expenses of the petitioner's railroad property for the period commencing January 1, 1942, to the present time, and to report his findings by a short day. The filing of a motion by petitioners for leave to file an original petition for mandamus in this court followed, and was allowed. The petition prays that respondent be ordered to enter the decree presented or a decree of similar import.

[1] The respondent argues that the defendants in the equity suit are indispensable parties to any mandamus proceeding affecting that suit. In People ex rel. Olson v. Scanlan (1920) 294 Ill 64, 128 NE 328, the procedure of making the trial judge the sole respondent in cases of this character was approved by this court. The point loses its force further from the fact that the petitioners moved to amend and make additional parties

respondents, which motion was denied.

The question of rates is fully covered in Sprague v. Biggs (1945) 390 Ill 537, 61 PUR(NS) 15, 30, 62 NE 2d 420, and is not open for discussion on this hearing. We held in that case that "The property managed and controlled by the trustees is devoted to a public use and the trustees on behalf of the trust estate are entitled to reasonable compensation for such use."

In our opinion this court clearly held that a rate of fare which does not produce income sufficient to meet operating expenses is confiscatory, and approved the finding, in Norfolk & W. R. Co. v. Conley, 236 US 605, 59 L ed 745, PUR1915C 293, 35 S Ct 437, that rates yielding at most a very narrow margin above the operating expenses may be confiscatory. We further held that the trustees in that case were entitled to a temporary increase in fares to meet operating expenses, and that a court of equity should act to prevent irreparable injury by enjoining the enforcement of orders denying a temporary increase in rates.

We find nothing in our opinion or the mandate which directs the court to open up the case for a trial de novo on any material issue in the case. There was nothing said by this court in the opinion which expressly or by implication authorized the respondent to permit further pleadings to be filed or to refer the case to a master in chancery for the purpose of taking further proof on the issue of confiscation. The language of our opinion does not contemplate a retrial on that issue or the taking of further evidence.

[2, 3] As we review the case, our opinion was complete and final as to the finding of confiscation, and it was the duty of respondent to follow the mandate which gave specific directions for the entry of a decree in accordance with the views expressed, and upon the record as made. People ex rel. Olson v. Scanlan, *supra*; Wilson v. Fisher (1938) 369 Ill 538, 17 NE2d 216. The question as to what is a proper rate is still pending before the Commission.

The petitioners have shown a clear right to a writ of mandamus, and it is, therefore, awarded, commanding respondent to enter a decree.

Writ awarded.

On Petition for Rehearing

PER CURIAM:

[4] The arguments advanced in support of respondent's petition for rehearing and the motions of the city of Chicago and members of the Illinois Commerce Commission asking leave to intervene indicate there is gross misapprehension as to the real issue in this case. In Sprague v. Biggs (1945) 390 Ill 537, 61 PUR (NS) 15, 62 NE2d 420, it was held that the record showed that the rate of fare imposed on the utility was confiscatory, in that the operating income was insufficient to meet operating expenses. It was also held, against the utility's contention, that the record did not show a state of facts upon which a fare could be fixed that would produce a fair return on the investment. The cause was remanded with directions to proceed in accordance with the views expressed. If the distinction between the issue in a confiscation case and a review in this court on the

Commission's finding pursuant to § 68 of the Public Utilities Act (Ill Rev Stat 1945, Chap 111⅔, par 72) had been observed there would have been no occasion for the instant action. The effect of the remandment order was that the Commission should be enjoined from requiring the utility to operate on a schedule of fares that would not produce operating income sufficient to meet operating expenses. It was not the function of this court or of the trial court to determine what that fare should be. It is clear that the schedule of fares which was automatically restored when the utility's proposed schedule of 12 cents was permanently suspended by the Commission is not sufficient, but neither this court nor the trial court could fix a reasonable fare in a confiscation case. An examination of the opinion adopted in this case and in Sprague v. Biggs, *supra,* will show that we did not hold that the 12-cent fare proposed by the utility was a reasonable fare. The amount of the increase over the schedule of fares now in force is for the Commission to determine, and after the injunction is issued by the trial court as directed in the remanding order, the Commission should proceed without delay to advance the schedule of fares to such a point as to check the confiscation decided in Sprague v. Biggs, *supra,* by providing a return of income sufficient to meet operating expenses. The filing of inapt motions in this court, the trial court or before the Commission (in attempts to relitigate that which has been determined) prolongs the confiscation.

The petition for rehearing is denied. The motions of the city of Chicago and the members of the Commission for leave to intervene are also denied. It is *ordered* that the writ issue immediately.

WISCONSIN PUBLIC SERVICE COMMISSION

Re Town Line Farmers Independent Telephone Association

2-U-2124
June 12, 1946

APPLICATION *for authority to increase telephone rates; new rate schedule authorized.*

Return, § 111 — Reasonableness — Telephone company.

1. A return of 6 per cent on the rate base of a telephone company was considered reasonable, p. 306.

Rates, § 556 — Extension telephones — Residence and business phones.

2. A telephone company's practice of classifying telephones in residential premises remote from a subscriber's place of business as extension service

is contrary to the accepted definition of extension service, *i. e.*, a station located in the same local service area as the associated main station, p. 306.

By the COMMISSION: The Town Line Farmers Independent Telephone Association, Shawano, Shawano county, filed an application with this Commission on January 23, 1946, for authority to increase rates. Federal agencies were notified of the proposal as required by the Commission's General Order No. 2.

APPEARANCES: Town Line Farmers Independent Telephone Association, by William J. Beversdorf, President; A. H. Klebesadel, Secretary; Erwin Beversdorf, Treasurer and Manager; Charles Raasch, Director, and Henry Knitt, Director.

The Town Line Farmers Independent Telephone Association serves approximately 205 rural multiparty subscribers in the rural area adjacent to Shawano and Clintonville. Exchange service of 123 subscribers is provided through the Shawano exchange of the Wisconsin Telephone Company, and 82 subscribers are switched through the Clintonville exchange of the Urban Telephone Company. On December 31, 1945, the applicant had 76 miles of pole line and 420 miles of wire in service. All telephone instruments are owned by the company and all lines are metallic circuits. Of the 205 subscribers, 114 are stockholders in the company.

The present and proposed rates are as follows:

	Net per month	
	Present	Proposed
Rural multiparty service ..	$1.18	$1.50
Extension telephone service	.25	.75

The applicant's income statement for 1945, as reported to the Commission, shows a net operating loss of $182. The total amount expended for salaries of lineman and for materials and supplies was charged to expenses. Normally a part of such expenditures would be charged to capital accounts. However, after adjustment of the 1945 income statement to give effect to normal operating conditions with respect to division of labor and materials expense between capital and operating expenses, the adjusted statement indicates that income and expenses for 1945 were approximately equal.

The salary of the lineman was increased $120 per year in 1945 and $120 on January 1, 1946. The salary of the secretary has been increased $25 per year. The wages paid to laborers employed for major maintenance work have increased approximately 50 per cent since last year. The applicant plans to increase its expenditures for labor and material during the next few years but since such increased expenditures are planned for the purpose of rebuilding lines and replacing telephone instruments, they will be chargeable to plant accounts and will not materially affect operating expenses.

The estimated income and expense of the applicant at rates authorized herein follow:

Estimated Income Statement at Authorized Rates		
Revenues at proposed rates		
205 subscribers @	$18	$3,690
7 extensions @	6	42
		$3,732

Revenue deductions		
Repair labor—		
Lineman's salary	$600	
Extra labor	200	
		$800
Repair materials and supplies		300
Switching service		1,415
General office salaries		155
Other general expense		250
Total expenses		$2,920
Depreciation expense		403*
Taxes other than income		77
Income taxes		76
Total operating revenue deductions		$3,476
Net operating revenues		$256

* The applicant's accounting with respects to telephone plant has been erroneous in that additions to plant have not been recorded in all cases. In order to determine an adequate annual charge for depreciation expense, the amount of such charge was related to an estimate of the cost of plant determined from a consideration of the investment in telephone plant recorded by comparable companies.

From data contained in the applicant's 1945 report, a rate base is determined as follows:

Cost of plant	$5,110
Less reserve for depreciation	1,318
Net book value of plant	$3,792
Working capital	$300
Materials and supplies inventory	100
Rate base	$4,192

[1] The rate base as found above is reasonable. A return of 6 per cent on the rate base is indicated on the basis of the estimate of income and expenses. Such return is reasonable.

[2] The proposed rate of 75 cents per month for extension telephone service is reasonable for business service but would be unreasonable for residence extension telephone service. Studies on the cost of rendering residential extension service indicate that a rate of 50 cents per month is reasonable for such service, and the rates applied for will be modified accordingly. The practice of the applicant has been to classify telephones in residential premises that are remote from business premises of the customer as extension service. This practice is contrary to the accepted definition of extension telephone service. A rule designed to clarify the availability of extension telephone service is included herein.

The Commission finds:

That the present rates of the Town Line Farmers Independent Telephone Association are inadequate and unreasonable and that the rates herein authorized are adequate and reasonable.

ORDER

It is therefore *Ordered:*

That the Town Line Farmers Independent Telephone Association adopt the following rates and rules to become effective July 1, 1946:

Rural multiparty service	$1.50 net per mo.
Extension telephone service	
Business	.75 " " "
Residence	.50 " " "

Extension Telephone Service Rule

Extension stations must be located in the same local service area as the associated main station.

Separate telephone numbers or other distinctive designations are not assigned to extension stations, nor is code ringing permitted. Extension stations are not listed and no additional free listings are allowed in connection with the main station on account of extension stations.

When either main or extension station is located at a business classification, business rates apply to both stations.

Re Bellows Falls Hydro-Electric Corporation

No. 1744
— Vt —, 47 A2d 409
May 21, 1946

APPEAL *from state Commission order authorizing dam construction on navigable stream; reversed and petition for authority dismissed.*

Appeal and review, § 78 — State Commission order — Judicial notice of Federal statute.

1. The court, in reviewing a state Commission order authorizing the erection of a dam in a navigable stream, must take judicial notice of all provisions of the Federal Power Act which apply to the subject matter, notwithstanding that none of the briefs filed in the case mentioned any provisions of that statute, p. 308.

Appeal and review, § 66 — Dismissal without decision on merits — Want of jurisdiction.

2. The court will dismiss an appeal without a decision on the merits, whether moved by a party or not, when it is discovered that it has no jurisdiction, and jurisdiction over the subject matter cannot be conferred by agreement or consent of the parties when it is not given by law, p. 308.

Water, § 10 — Jurisdiction of state Commission — Dam construction on navigable stream.

3. A state Commission has no authority to authorize a domestic hydroelectric corporation to erect a dam on a navigable stream, since such a river comes within the purview of the Federal Power Act giving the Federal Power Commission jurisdiction over such construction, p. 308.

Before Moulton, CJ., Sherburne and Sturtevant, JJ., and Cleary and Adams, Superior Judges.

APPEARANCES: Wilson & Keyser, of Chelsea (F. J. Dunn, of Boston, Mass., of counsel), for plaintiff; Barber & Barber, of Brattleboro, and Witters & Longmoore, of St. Johnsbury, for defendant.

STURTEVANT, J.: This is an appeal from an order of the Public Service Commission, purporting to grant authority to the Bellows Falls Hydro-Electric Corporation to redevelop its water power facilities on the Connecticut river by the erection of a dam in that stream, between the towns of Hartford, Vermont, and Lebanon, New Hampshire. The petitioner is a public service corporation, organized under the laws of this state and the

dam which it proposes to erect is for the purpose of developing electric power. The petition was brought, hearing had thereon, findings of fact made and filed by the Public Service Commission and its order, dated November 9, 1945, issued thereon, all in accordance with the provisions of P.L. 6122, as amended by No. 138 of the Acts of 1945. So far as here material, the provisions of that act are as follows: "A person . . . or domestic or foreign corporation shall not construct any dam .. . . . in any stream, or river within or along the borders of this state where Vermont land is proposed to be overflowed, . . . unless authorized by the Public Service Commission so to do. . . ."

[1] While none of the briefs filed in this case makes any mention of the provisions of the Federal Power Act, 16 USCA § 791a et seq., yet this court is bound to take judicial notice of all provisions of that act which apply to the subject matter of the petition. Bouchard v. Central Vermont R. Co. (1914) 87 Vt 399, 401, 89 Atl 475, LRA 1915C 33. Section 23(b) of that act, 16 USCA § 817, states as follows:

"It shall be unlawful for any person, state, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, . . . across, along, or in any of the navigable waters of the United States, . . . except under and in accordance with the terms of a permit or valid existing right of way granted prior to June 10, 1920, or a license granted pursuant to this act. . . ."

[2, 3] That the Connecticut river is a navigable stream of the United States is not in question here. Therefore, at the outset, we are confronted with the following questions: Does P. L. 6122, as amended by No. 138 of the Acts of 1945 have any application to the subject matter of the petition in this case when considered in connection with the Federal Water Power Act, enacted by Congress June 10, 1920, as amended by the Federal Power Act approved August 26, 1935? 16 USCA § 791a et seq. In short, did the Public Service Commission have jurisdiction of the subject matter of this petition? If not, then this appeal brings nothing to this court for review and it follows that we are without jurisdiction to consider the merits of the case. Although neither of the parties is raising the question of jurisdiction by motion, or otherwise, nevertheless, it has long been the law of this state that a court will dismiss a cause at any stage, whether moved by a party or not, when it is discovered that it has no jurisdiction; and also that jurisdiction over the subject matter of a suit cannot be conferred by agreement or consent of the parties when it is not given by law. Miner's Executrix v. Shanasy (1917) 92 Vt 110, 112, 102 Atl 480; Re Jesse Carleton (1936) 108 Vt 312, 315, 187 Atl 423; also see Howe v. Lisbon Sav. Bank & Trust Co. (1940) 111 Vt 201, 14 A2d 13, for a discussion of the subject of court jurisdiction.

The answer to the question before us is found in the opinion of the United States Supreme Court in First Iowa Hydro-Electric Cooperative v. Federal Power Commission (1946) — US —, 90 L ed —, 63 PUR(NS) 193, 66 S Ct 906. It appears from the

facts, as stated in that opinion, that, in that case, the petitioner is a cooperative association organized under the laws of Iowa, with power to generate, distribute, and sell electric energy. On June 29, 1940, pursuant to the provisions of the Federal Power Act, it filed with the Federal Power Commission, a declaration of intention to construct and operate a dam, reservoir, and power plant on the Cedar River near Moscow, Iowa. On April 2, 1941, it also filed with the Commission an application for a license, under the provisions of the Federal Power Act, to construct an enlarged project. This project contemplated taking most of the water from the Cedar river at Moscow, Iowa, and by a diversion canal, conduct it to Muscatine, Iowa, where it would enter the Mississippi river. The Cedar river enters Iowa from the north, flows through that state to Columbus Junction, Iowa, where it joins the Iowa river from which point the last-named river flows southeasterly into the Mississippi at a point about 20 miles below Muscatine. Among other facts, the Commission found that these rivers are navigable and that under the provisions of the Federal Power Act, a license is required for the proposed project. The petitioner filed an application for such license on August 11, 1941. On November 4, 1941, the Commission granted the state of Iowa's petition to intervene, and since that time, that state has actively opposed the granting of the Federal license as prayed for by the petitioner. After hearing, the Commission filed findings of fact approving the project. Referring to this matter, on page 910 of the opinion in 66 S Ct, 63 PUR (NS) at p. 197, the court states: "The Commission, however, was confronted at that point with a claim by the state of Iowa that the petitioner must not only meet the requirements for a Fderal license for the project under the Federal Power Act, but should also present satisfactory evidence of its compliance with the requirements of Chap 363 of the Code of Iowa, 1939, hereinafter discussed, for a permit from the state executive council of Iowa for the same project."

It appears that the Commission was of the opinion that this claim of the state was without merit, however, it dismissed the petition without prejudice, for the purpose of affording an opportunity of obtaining a determination of this question by the courts. On the applicant's application for a review of the dismissal, it was affirmed by the United States court of appeals for the District of Columbia (1945) — US App DC —, 60 PUR (NS) 343, 151 F2d 20. Then the United States Supreme Court granted certiorari (1946) 66 S Ct 337. At page 911 of the opinion in 66 S Ct, 63 PUR(NS) at p. 198, the court states: " . . . For the purposes of this application, it is settled that the project will affect the navigability of the Cedar, Iowa, and Mississippi rivers, each of which has been determined to be a part of the navigable waters of the United States, . . .; and will require for its construction a license from the Commission. The project is clearly within the jurisdiction of the Commission under the Federal Power Act. The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compliance with the

terms of Chap 363 of the Code of Iowa. . . ." Referring to this same matter, on page 911 of the opinion in 66 S Ct, 63 PUR(NS) at p. 198, the court states: "Section 7767 of that chapter is alleged to require the issuance of a permit by the executive council of the state and is the one on which the Commission's order must depend. It provides:

"'7767 Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same.'"

In answer to Iowa's claim on this matter, the court, at p. 911 of the opinion in 66 S Ct, 63 PUR(NS) at p. 199, states: "To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a Federal license for the same project under the Federal Power Act would vest in the executive council of Iowa a veto power over the Federal project. Such a veto power easily could destroy the effectiveness of the Federal act. It would subordinate to the control of the state the 'comprehensive' planning which the act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal government."

At page 912 of the opinion in 66 S Ct, 66 PUR(NS) at p. 199, the court points out that the provisions of § 7771 of the Iowa code, if given effect, make the proposed project impossible because, among other things, that statute provides: "If it shall appear to the council that . . . any water taken from the stream in connection with the project is returned thereto at the nearest practicable place, . . . it shall grant the permit." The proposed project contemplates taking most of the water from the Cedar river and conducting it to the Mississippi which cannot be done if those statutory provisions are complied with. At pages 912 and 913 of the opinion in 66 S Ct, the court shows that it was this proposed diversion of the waters of the Cedar river that commended this proposed project to the Commission.

At page 914 of 66 S Ct, 66 PUR (NS) at p. 201, the court holds:

"The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a Federal license." At page 920 of 66 S Ct, 66 PUR(NS) at p. 208, it is stated: "The detailed provisions of the act providing for the Federal plan of regulation leave no room or need for conflicting state controls." On the same page the Court cites with approval, United States v. Appalachian Electric Power Co. (1940) 311 US 377, 404, 405, 426, 427, 85 L ed 243, 36 PUR(NS) 129, 61 S Ct 291. At page 920 of 66 S Ct, the court quotes at length from that case. That quotation contains the following, 66 PUR(NS) at p. 209: "'. . . But there is no doubt that the United States possesses the power to control the erection of structures in

navigable waters.'" Also on that page, the concluding holding of the court is: "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

The judgment of the lower court was reversed with direction that the case be remanded to the Federal Power Commission for further proceedings in conformity with that opinion.

From the foregoing it follows that the Public Service Commission was without authority in law to entertain the petition in the case at bar and should have dismissed the same. It follows that the attempted appeal presents no question on the merits of the case for our consideration.

The judgment order of the Public Service Commission, dated November 9, 1945, purporting to authorize the petitioner, Bellows Falls Hydro-Electric Corporation, to construct a dam on the Connecticut river as prayed for in the petition, is reversed and the petition is dismissed for want of jurisdicton.

NORTH DAKOTA PUBLIC SERVICE COMMISSION

Re Cavalier Rural Electric Cooperative, Incorporated

Case No. 4250
May 27, 1946

APPLICATION *by rural electric coöperative for authority to construct, operate, and maintain electric supply lines; approved.*

Certificates of convenience and necessity, § 12 — Commission jurisdiction — Electric coöperative.

The contention of an electric coöperative that a state Commission lacks jurisdiction to issue certificates of convenience and necessity to electric coöperative corporations was considered to possess substantial merit and sustained pending clarification of legislative intent by appropriate legislation or judicial interpretation.

By the COMMISSION: The Cavalier Rural Electric Coöperative, Inc., of Langdon, North Dakota, having filed its petition with this Commission praying for authority to construct, operate, and maintain the electric supply lines described therein, which application was accompanied by maps showing the locations and routes of the electric supply lines which the applicant intends to so construct, operate, and maintain, and the Commission

having noticed said petition for hearing upon its merits at a place provided by the applicant, at Langdon, on the 25th day of April, 1946, at the hour of 10 A.M., Central Standard Time, and having caused due notice thereof to be served upon all interested parties in the manner provided by law, the following appearances were entered at the time of the hearing:

Snowfield & Snowfield, Attorneys, Langdon, North Dakota, for Cavalier Rural Electric Coöperative, Inc.; Robert W. Carlson, Chief Engineer, for the Public Service Commission of the state of North Dakota.

That at the time and place specified for said hearing the applicant submitted its evidence and exhibits in support of its petition. That no one appeared to protest or object to the granting of the authority sought by the applicant, and the Commission having duly considered all of the evidence and exhibits so offered and received, and being fully advised in the premises, makes the following:

Findings of Fact

I

That the applicant is an electric coöperative corporation organized pursuant to the provisions of § 10–13 of the R. C. of 1943.

II

That the applicant has filed its petition with this Commission for authority to construct, operate, and maintain the electric supply lines described therein pursuant to the provisions of § 49–20 of the R. C. of 1943.

III

That the applicant seeks authority to construct, operate, and maintain electric supply lines primarily within the counties of Cavalier and the north quarter of Ramsey, as more fully shown by the petition and exhibits on file in said proceeding.

IV

That, in order to avoid or mitigate interference of electrical supply lines with signal lines, and to avoid or minimize the hazard of injury to persons or property, the applicant intends to construct, operate, and maintain said electric supply lines in accordance with applicable provisions of the National Electrical Safety Code and with the rules and regulations of this Commission applicable thereto.

V

That the applicant has challenged the jurisdiction of this Commission to issue a certificate of public convenience and necessity, contending that jurisdiction of the Commission is limited to approval of the construction and operation of its electrical supply lines pursuant to the provisions of § 49–20 of the R. C. of 1943.

Conclusions

I

Jurisdiction of Commission

Counsel for the Electric Coöperative Corporation has challenged the jurisdiction of this Commission to issue certificates of public convenience and necessity to a coöperative corporation, contending, in effect, that the Commission has no jurisdiction over said coöperatives except to authorize the construction and operation of its electrical supply lines pursuant to the

provisions of § 49–20 of the R. C. of 1943.

The coöperative corporation relies upon the following reasons and authority to sustain its contention:

1. That said coöperative was expressly organized pursuant to the Electric Coöperative Corporation Act, Chap 115, Session Laws, 1937 (now § 13–10 R. C. of 1943).

2. That the Electric Coöperative Corporation Act of 1937 is a special statute, and as such is controlling. State ex rel. Braatelien v. Drakeley (1913) 26 ND 87, 143 NW 768.

3. That the Electric Coöperative Corporation Act expressly provides, in part; that: *"This act is complete in itself and shall be controlling.* The provisions of any other law of this state, except as provided in this act, shall not apply to a corporation organized under this act." (Section 36, Chap 115, Session Laws, 1937.) Kist v. Butts (1942) 71 ND 436, 1 NW2d 612, 138 ALR 1206.

4. That the applicant is not a public utility in the sense that said term is employed in the Public Utility Act of 1919, as amended, because the applicant can only furnish electric service to its members. Citing among others the following cases: Colorado Utilities Corp. v. Public Utilities Commission (1936) 99 Colo 189, 17 PUR(NS) 187, 61 P2d 849; State ex rel. Danciger v. Public Service Commission, 275 Mo 483, PUR 1919A 353, 205 SW 36, 18 ALR 754; Inland Empire Rural Electrification v. Department of Public Service (1939) 199 Wash 527, 30 PUR(NS) 173, 92 P2d 258.

5. That this Commission has no jurisdiction, except such as is expressly conferred by law or arises by reasonable implication from express powers granted. That neither the Electric Coöperative Corporation Act nor the Public Utility Act or any amendments thereof confer any authority expressly or by necessary implication upon this Commission to issue to said coöperative a certificate of public convenience and necessity, and that by reason thereof this Commission does not possess such power. Thomas v. McHugh (1934) 65 ND 149, 5 PUR(NS) 488, 256 NW 763; Lyons v. Otter Tail Power Co. (1938) 68 ND 403, 406, 25 PUR(NS) 431, 280 NW 192.

The Commission has carefully considered all briefs filed, and the oral argument both challenging and defending its jurisdiction to issue certificates of public convenience and necessity to electric coöperative corporations, and has determined that, while the question is not free from legal doubt, the contention that this Commission has no jurisdiction to issue certificates of public convenience and necessity to electric coöperative corporations has substantial merit, and should be sustained until the legislative intent can be clarified either by appropriate legislation or by judicial interpretation; and therefore the Commission concludes that its order in this proceeding should be limited to a grant of authority to construct, operate, and maintain the electric supply lines pursuant to the provisions of § 49–20 R. C. of 1943.

II.

The Commission further concludes that the applicant intends to, and will, construct, operate, and maintain the

electric supply lines described in its petition in accordance with the rules and regulations prescribed by this Commission pursuant to § 49–20 of the R. C. of 1943; and the Commission being fully advised in the premises;

Now therefore it is *ordered* that the Cavalier Rural Electric Coöperative, Inc., of Langdon, North Dakota, be and is hereby authorized to construct, operate, and maintain the electrical supply lines described in its petition, provided, that the applicant shall fully comply with applicable provisions of the National Electrical Safety Code and with the rules and regulations of this Commission applicable thereto, in the construction, operation, and maintenance of said electrical supply lines.

NEBRASKA SUPREME COURT

Nebraska Power Company

v.

Omaha Ice & Cold Storage, Incorporated

No. 32116
— Neb —, 23 NW2d 312
May 31, 1946

APPEAL *from Commission order granting application for authority to issue and sell serial notes; dismissed.*

Appeal and review, § 80 — Parties — Commission order.

1. Within the contemplation of § 75–405, Revised Statutes, 1943, the parties designated therein as having the right to institute proceedings in the supreme court to reverse, vacate, or modify an order of the State Railway Commission must have either a substantial right, a property right, or a pecuniary right adversely or injuriously affected, or some right other than merely a general interest common to all members of the public adversely or injuriously affected, p. 317.

Security issues, § 129 — Parties — Sale of notes — Objections by consumer.

2. Where an application is filed before the State Railway Commission for authority to issue and sell serial notes to retire preferred stock of a corporation, and objections are made to the jurisdiction of the Commission to entertain the subject matter contained in such application, and such objections merely recite that the objector is a customer of the applicant using a large quantity of electric energy, and setting forth no allegations in the objections to disclose in which manner any right or interest of the objector is adversely or injuriously affected, the objector then does not have such a

right or interest as would warrant it in instituting proceedings in the supreme court as provided for in § 75–405, Revised Statutes, 1943, p. 318.

Headnotes by the Court.

APPEARANCES: Chambers & Holland, of Lincoln, for appellant; Fraser, Connally, Crofoot & Wenstrand and W. H. Wright, all of Omaha, for appellee.

Heard before Simmons, C. J., and Paine, Carter, Messmore, Yeager, Chappell, and Wenke, JJ.

MESSMORE, J.: This is an appeal by the Omaha Ice & Cold Storage, Inc., from an order of the Nebraska State Railway Commission after hearing had on application No. A–16266 of the Nebraska Power Company of Omaha, Nebraska, wherein the Commission granted it authority to issue and sell its serial notes in the principal amount of $7,000,000 to be dated as date of issuance thereof which would not be later than September 1, 1945, and to issue and pledge as collateral security for its said notes, its bonds in the principal amount of $7,000,000, the purpose being to retire its outstanding preferred stock. The Commission overruled the objections of the Omaha Ice & Cold Storage, Inc., which challenged the jurisdiction of the Commission over the subject matter contained in the application. From this order of the Commission the Omaha Ice & Cold Storage, Inc., appealed.

For convenience, the Omaha Ice & Cold Storage, Inc., will hereinafter be referred to as appellant, the Nebraska Power Company as appellee, and the State Railway Commission as the Commission.

The case is before this court upon the appellee's motion to dismiss the appeal. The motion in substance, is as follows: (1) The appellant has no such interest in the subject matter involved as to legally warrant or justify an appeal by it; (2) the appellant is not aggrieved and will not be affected in any way by any order entered either affirming or reversing the order of the Commission with reference to the subject matter of the objections filed by it; (3) the objections of the appellant raise solely the question of the jurisdiction of the Commission over the subject matter of the application filed by the appellee, and a determination of such question, in so far as the appellant is concerned, amounts only to an abstract question of law in no wise affecting substantial rights of the appellant; and (4) the issues, as indicated by the transcript, involve only the question of jurisdiction of the Commission, and a determination of the same will not affect property or other rights of either the appellant or the appellee.

The objections filed by the appellant to the application of the appellee before the Commission, in so far as need be considered here, object to the jurisdiction of the Commission over the subject matter, alleging that appellant is a large consumer of electric energy in the city of Omaha, and a customer of the appellee.

The appellant, in its brief, states the question before this court to be, whether a customer of the appellee has such an interest as will permit an appeal under § 75–405, Rev Stats 1943?

The appellant sets forth, to show the liberality in making complaint before the State Railway Commission, § 75–401, Rev Stats 1943, and § 75–411, Rev Stats 1943, which sections, in the main, have to do with the fixing of rates and discrimination in rates by railroads and other common carriers, notice to be given, hearings thereon and pleadings to be filed, none of which are involved in this appeal.

The appellant cites the case of Lincoln Commercial Club v. Missouri P. R. Co. 103 Neb 504, PUR1919E 57, 172 NW 687. This case was brought by the Lincoln Commercial Club as representative of a class of interested persons, and dealt exclusively with discrimination in rates. The court held: "Where unjust discrimination arises as between individuals or localities, by reason of the absorbing of switching charges in certain instances and not in others under like circumstances and conditions, the carrier may be required to remove the discrimination by a change in tariff schedule eliminating the charge."

It is apparent from an analysis of §§ 75–401 and 75–411, Rev Stats 1943, that in so far as the fixing and determination of rates by railroads and other common carriers is concerned, the right to complain, as provided for in such statutory provisions, is broad enough to include a civic club organized for commercial purposes, as in the case of the Lincoln Commercial Club v. Missouri P. R. Co. *supra*. However, the question of the right to appeal in the cited case, was not raised in this court. It is therefore apparent, a clear distinction exists between the applicability of the foregoing statutory provisions to the case of the Lincoln Commercial Club v. Missouri P. R. Co. *supra*, and the subject matter before this court in this appeal wherein no questions of rates are involved.

We now set forth, in substance, § 75–405, Rev Stats 1943: "If any . . . person or persons affected thereby, shall be dissatisfied with the decision of the State Railway Commission affirming, revising, annulling or modifying any rate or rates complained of in the original schedule, or any subsequent schedule, which may be the subject of investigation, or with the decision of the Commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by them upon which there has been a hearing before the Commission, except as otherwise expressly provided for herein, such dissatisfied . . . person or persons affected may institute proceedings in the supreme court of Nebraska to reverse, vacate or modify the order complained of; . . ."

The appellant cites Poppleton v. Moores (1901) 62 Neb 851, 855, 88 NW 128, 129; (1903) 67 Neb 388, 93 NW 747, in support of its contention. The action was brought by a water user and taxpayer to enjoin the mayor and city council of Omaha from passing an ordinance postponing the city's rights to purchase, at an appraised value, the plant of a waterworks company. The right of a citizen to maintain such a suit was among the things objected to. The appellant quotes from the first opinion in the above-cited case the following: "The allegations as to the manner in which plaintiff will be affected by it seem amply to disclose such an interest as a

court of equity should protect against an unauthorized action of municipal authorities. It involves at least a possible, if not a certain, maintenance of water rates and an embarrassment of one remedy if rates are oppressive."

It will readily be discerned, by an analysis of the cited case, that the proposed action to be taken by the municipality, which was unlawful, would affect the substantial rights of this taxpayer and all taxpayers who were water users of the city.

It is interesting to note that in the second opinion in the cited case, this court held: "Wholly unauthorized action under color of office by municipal authorities, which injuriously affects the interest of a taxpayer and water user of the city, and for which he has no direct remedy at law, warrants an injunction to protect him." Obviously the case is not in point with the subject matter under consideration in this appeal.

We note the following language in § 75–405, Rev Stats 1943: "If any . . . person or persons affected thereby, shall be dissatisfied with the decision of the State Railway Commission . . . , such dissatisfied . . . person or persons affected may institute proceedings in the supreme court of Nebraska to reverse, vacate or modify the order complained of; . . ."

The word "affected" is not a word of art, but a word of ordinary English. It is capable of a very large meaning. See 1 Stroud's Judicial Dictionary, 2d Ed. p. 50.

"Affect" means "to act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things." Black's Law Dictionary, 3d Ed. p. 72. See, also, 1 Bouv Law Dict Rawles Third Revision, p. 158.

"The word 'affect,' as applied to such parties as a reversal of a judgment would affect, means adversely affect." 2 Words and Phrases, Perm Ed. p. 634.

"Adverse" means having opposing interests; having interests for the preservation of which opposition is essential. See Webster's New International Dictionary, 2d Ed. Unabridged, p. 38.

The word "adversely" means where all parties whose interest may be materially affected by reversal or modification of judgment, are "adversely interested." See 2 Words and Phrases, Perm. Ed. p. 549.

[1] It is therefore clear that within the contemplation of § 75–405, Rev Stats 1943, some right of appellant must be adversely or injuriously affected by the order of the Commission, either a substantial right, a property right, a pecuniary right, or some right other than merely a general interest common to all members of the public, to warrant institution of proceedings in the supreme court as provided in such statute.

We have heretofore mentioned briefly the allegation of the appellant's motion objecting to the jurisdiction of the Commission in so far as the same need be considered in determining this appeal. We repeat, in substance, the allegation of such objection more specifically. Appellant alleges that it maintains an ice manufacturing plant and uses from $35,000 to $45,000 worth of electric power and energy at the present rates charged for such service by the appellee, and appel-

lant files this protest on its own behalf and on behalf of all other users of electric power and energy similarly situated. The allegations of the objections do not allege in what manner the appellant would be injured, or in what manner appellant would be affected adversely or injuriously, by the granting of appellee's application. In the absence of any such allegations in the appellant's motion, we must conclude that the appellant has failed to allege that it has any interest in the subject matter here involved. Consequently, the appellee contends that appellant has no right of appeal in the matter, because it has no interest in the subject matter of the action; it is not injured in any way by the order of the Commission; no judgment has been rendered against it, and it is not aggrieved by the order permitting the issuance and sale of such bonds.

In view of the foregoing, we conclude that within the contemplation of § 75–405, Rev Stats 1943, the use of language therein as follows: "If any . . . person or persons affected thereby, shall be dissatisfied with the decision of the State Railway Commission . . . such dissatisfied . . . person or persons affected may institute proceedings in the supreme court of Nebraska to reverse, vacate, or modify the order complained of; . . . ," means any person or persons who either have a substantial right, a property right, or a pecuniary right that would be adversely or injuriously affected, or some right other than merely a general interest common to all members of the public that would be adversely or injuriously affected as a result of the order of the Commission.

[2] As heretofore pointed out, the appellant has failed to allege in its objections that any such rights as hereinbefore set out have been adversely or injuriously affected by the order of the Commission.

The law that one not prejudiced by a judgment cannot obtain a review thereof, and the rule is the same with reference to an order of the State Railway Commission, is so well established in this state that citation of authority in such respect is deemed unnecessary.

For the reasons given in this opinion, the motion to dismiss the appeal is sustained.

Motion to dismiss appeal sustained.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Limbach Company

v.

The Baltimore & Ohio Railroad Company

Complaint Docket No. 14101
July 9, 1946

PETITION *for modification of Commission order dismissing complaint against railroad company in regard to use of spur track; denied.*

Railroads, § 10 — Commission jurisdiction — Spur tracks and sidings.

1. A siding, used and connected with a railroad in such a way as to be considered an integral part of the system, is a "public highway" subject to Commission regulation, p. 320.

Witnesses, § 5 — Subpoena duces tecum — Railroad records.

2. A subpoena duces tecum for production of evidence will not be allowed where its purpose is to prove the "public use" of a railroad siding concededly a "public highway," p. 320.

By the COMMISSION: This matter comes before us upon the petition of the Limbach company, complainant, for modification of our order of June 3, 1946, in the above-captioned complaint proceeding and answer thereto filed by The Baltimore and Ohio Railroad Company, respondent.

The involved complaint was instituted by The Limbach Company, a partnership engaged in a heating, ventilating, air conditioning, and roofing business and alleges that The Baltimore and Ohio Railroad Company refused to allow complainant the use of a certain single side-track or spur along the southerly boundary of complainant's property for the hauling of carload shipments of property necessary to complainant's building program and business. Hearing in the matter was held on October 10, 1945.

On October 31, 1945, complainant and The Robinson Realty Company filed joint petitions concurrently for amendment and subpoena duces tecum. The petition for amendment requested the joinder of The Robinson Realty Company as a party complainant and also an amendment of the complaint to show the petitioners' respective interests in the use of the side-track or spur involved. The petition for subpoena duces tecum requested that respondent, The Pittsburgh and Western Railroad Company and The Schuylkill Improvement Land Company of Philadelphia be directed to produce vari-

ous records allegedly tending to show the circumstances pertinent to respondent's acquisition and use of said siding facilities and the land upon which said facilities are situated "for whatever bearing those circumstances may have upon the question of public use."

In our order of June 3, 1946, we disposed of both petitions by denying the prayers thereof on the ground that no useful purpose would be served by the granting of said prayers.

Our ruling on the petition for allowance of joinder and amendment was predicated upon the fact that the record and pleadings made it apparent that complainant was the primary and real party interested in the use of the siding facilities. No exception having been taken in this respect, we do not deem it necessary to discuss the matter further.

[1, 2] Complainant now requests that we reconsider and grant the prayers of its petition for subpoena duces tecum and modify our order of June 3, 1946, accordingly.

We find no reason for doing so. The various records designated in the petition for subpoena duces tecum were requested by complainant for the purpose of proving a "public use" of the siding facilities. The record and pleadings in this proceeding admit the present use of said siding facilities by the S. and P. Coal Company and the connection of said facilities with respondent's railroad lines. Such use and connection has made the siding an integral part of respondent's railroad system. Said siding has become a "public highway" subject to our regulation. Lehigh Nav. Coal Co. v. Public Utility Commission (1938) 133 Pa Super Ct 67, 73, 28 PUR(NS) 321, 1 A2d 540. Consequently, the production of the records and documents desired by complainant can in no way be necessary for the purpose of proving "public use." Accordingly, we are of the opinion that any modification of our previous order entered in the matter would serve no useful purpose; therefore,

It is *ordered*: That the prayers of the petition of The Limbach Company, complainant, for modification of our order entered in the above complaint proceeding on June 3, 1946, be and are hereby denied.

Industrial Progress

A digest of information on new construction by privately managed utilities; similar information relating to government owned utilities; news concerning products, supplies and services offered by manufacturers; also notices of changes in personnel.

$45,000,000 Project Proposed By Georgia Power

PLANS for construction of the multi-million-dollar Clark Hill hydroelectric project near Augusta through private financing have been announced by P. S. Arkwright, chairman of the Georgia Power Company.

Mr. Arkwright announced that the Savannah River Electric Company, of which he is president, would file an application with the Federal Power Commission for renewal of its license to construct and operate the project. Formed for the purpose of developing Clark Hill, the Savannah River Electric Company halted construction in 1931 and because of the depression surrendered its license in 1932.

Cost of the initial development under the company's plans is estimated at nearly $45,000,000, and construction should be completed within three to three and a half years from the issuance of a license.

In the original installation the power house will contain water wheels and generators with a combined capacity of 160,000 horsepower, and it is planned to increase this capacity to 215,000 horsepower as soon as the larger generating capacity is needed. Ultimate plans call for additional water wheels and generators that will bring the total capacity to 375,000 horsepower. The plant will be capable of producing 474,000,000 kilowatt hours of firm power a year and about 705,000,000 kilowatt hours of primary and secondary power combined.

Jersey Central Pwr. & Lt. Has $1,904,148 Program

JERSEY CENTRAL POWER & LIGHT COMPANY has underway $1,904,148 construction program for its electric division. It is expected that approximately $1,343,549 will be spent during 1946.

It is estimated that $512,991 will be used for production equipment, $374,204 for transmission equipment, $907,313 for distribution equipment, and $109,640, for general plant equipment.

Robins Releases Bulletin On Eliptex Screen

ROBINS CONVEYORS INCORPORATED, Passaic, New Jersey, manufacturers of materials handling machinery, has released bulletin No. 111-A describing and illustrating the Robins Eliptex Screen.

The Eliptex employs a unique elliptical motion with three separate components: a horizontal component which moves the material across the deck quickly, giving high capacity; a vertical component which makes the material separate into sizes and keep moving; and an elliptical component which gives sharpest possible sizing—all three in one screen which can be installed horizontally to save headroom.

A copy of the bulletin may be secured by writing to Robins Conveyors Incorporated.

Allis-Chalmers to Supply Seminoe Plant Equipment

ELECTRICAL equipment for the Bureau of Reclamation's Seminoe power plant and the Alcova and Casper substations in Wyoming is being purchased under a $156,229 contract recently awarded.

The contract was awarded to the Allis-Chalmers Manufacturing Company of Milwaukee, Wisconsin. It covered the purchase of transformers and oil circuit-breakers, and included an amount of $4,155 for spare parts. Delivery must be made within 270 days from the time the contractor receives notice of the award. The equipment will be installed by the government.

A contract for construction of a 63-mile transmission line from the Seminoe power plant to Casper was awarded by the bureau in June.

New "CP" Requirements for Automatic Gas Ranges

NEW requirements for automatic gas ranges built to "CP" standards which are created to give the homemaker better cooking performance have been announced by E. Carl Sorby, vice president, Geo. D. Roper Corporation and chairman of the "CP" Manufacturers Group of the Gas Appliance Manufacturers Association.

The new "CP" requirements go into effect January 1, 1947, when, the gas range production rate is expected to exceed by at least 50 per cent the 2,300,000 ranges sold in 1941. Evidence that this production rate can be sold, according to Mr. Sorby, are the millions of new homes that will be built, the 12,540,000 gas ranges in homes that are more than ten years old and need replacement, and the 1,442,500 gain in residential gas customers since 1941, which brings the total number of homes now using gas for cooking in the United States and Canada to 20,750,000.

Unique in major appliance manufacture and

(*Cont'd. on page 22*)

(*Cont'd. from page* 21)

merchandising, "CP" technical requirements were created in 1938 to set a high standard of cooking performance, and to provide the consumer with an authentic industry-wide unbiased buying guide. To make sure all ranges bearing GAMA's "CP" trademark meet "CP" requirements, ranges are tested by laboratories other than the manufacturers. "CP" is a consumer protection, available in no other major appliances, GAMA states.

Five Cities Plan $6,500,000 Transit Expenditure

More than $6,500,000 will be spent on new trackless trolley coach installations in five major cities, according to announcements made recently by transit systems in Denver, Little Rock, Kansas City, Los Angeles, and Portland, Oregon.

The Denver Tramway Company will purchase 50 additional trolley coaches to modernize its service on three more downtown streets. This will make a total of 117 trackless trolleys. Los Angeles Transit Lines has ordered 120 new electric vehicles to be used on four central business streets.

Portland Traction Company will add 50 more trolley coaches to their present fleet of 141, and the Kansas City Public Service Company has announced further modernization plans calling for the purchase of 100 trackless trolleys to augment its 116 now in service. The Capital Transportation Company of Little Rock has placed an original order for 29 trolley coaches.

Florida Pwr. & Lt. To Install 45,000 KW Turbo-generator

Addition of a new 45,000 kilowatt turbo-generator which will more than double the capacity of the facilities at Miami has been announced by the Florida Power & Light Company. This will be the fourth major project in the company's $24,000,000 expansion program. Preliminary work has already been started.

The new generator will raise the capacity of the station to 79,000 kilowatts and is expected to be completed in 1948 if materials and equipment are delivered on schedule. Also added will be two great boilers and two 25,000,000 gallons-a-day circulating water pumps. Switches and other electrical equipment will be housed in the main building, which will require extensive alterations to accommodate this equipment.

In addition to more than doubling the present generating capacity in Miami the project will permit further expansion of service throughout nearby areas, just as the expansions at Sanford, Sarasota, and West Palm Beach make further service possible in those areas.

Absence of climate extremes have made possible a revolutionary design of the new equipment. The turbo-generator, boilers, and pumps will be constructed out of doors and water-

(*Cont'd. on page* 24)

(*Cont'd. from page 22*)

proofed against rain. Ability to do this will preclude possible damage to the units from falling debris during hurricanes.

Company President McGregor Smith said that this newest project in the expansion program is the result of load studies conducted over a period of years.

Northern Natural Gas Plans to Increase Pipeline Capacity

NORTHERN NATURAL GAS COMPANY, Omaha, Nebraska, has applied for authority to make extensive additions to its pipeline system running from Texas through Oklahoma, Kansas, Nebraska, Iowa, Minnesota, and South Dakota. Cost is estimated at $12,667,600.

The company plans to increase capacity of the line north of Clifton, Kansas, from 325 million cubic feet per day to 407 million cubic feet per day to meet anticipated demands for gas during the winter of 1947-48. In addition, it proposes to serve natural gas at wholesale for distribution in St. Paul, West St. Paul, and South St. Paul, Minnesota, and in Marshalltown, State Center, and Colo, Iowa.

In June, 1946, the company was authorized to construct facilities to increase its pipeline capacity from 270 million cubic feet to 300 million cubic feet per day to meet 1946-47 needs for heating. Since that time, Northern Natural has submitted still another request for permission to install six additional compressor units in existing stations to augment capacity to 325 million cubic feet for the coming winter's requirements.

Other construction includes about 35 miles of 16-inch pipeline from the Sunray, Texas, compressor station to a main line in Hutchinson county, Texas; and an extension of a lateral line from Ames, Iowa, to serve Marshalltown, State Center, and Colo; a dehydration plant at Sunray and appurtenant equipment.

The markets the company proposes to serve during the 1947-48 heating season with existing and proposed facilities consist of 198 communities with a total population of 2,000,000 of which 480,000 are residential gas consumers.

Paint Designed Stops Rust

SPECO, INC., Cleveland, Ohio, has announced a new type of industrial paint which can be applied directly over rusty surfaces without cleaning or scraping.

Known as Rustrem (Rust Remedy) this new black paint is claimed to seal rusty surfaces and stop rust permanently

Rustrem is expected to be widely utilized in the utility field on metal poles, manhole covers, metal pipe, gratings, hydrants, etc.

To Erect New Switching Station

PLANS have been approved by Public Service Electric and Gas Company for the construction of a new electric switching station in Ridgefield, New Jersey, in anticipation of increased residential, industrial, and commercial electric requirements in the company's Bergen division. It is expected that this new switching station will be placed in operation in the fall of 1947.

Construction Loans Announced

CONSTRUCTION loans—chiefly for distribution lines, system improvements or new or additional generating capacity—recently were made to the following enterprises by the Rural Electrification Administration:

Carroll Electric Membership Corporation, Carrollton, Ga., $50,000.

Coastal Electric Membership Corporation, Midway, Ga., $50,000.

Harrison County Rural Electric Membership Corporation, Corydon, Ind., $45,000.

Crow Wing Coöperative Power and Light Company, Brainerd, Minn., $400,000.

Marion Electric Coöperative, Marion, S. C., $25,000.

Floyd County Rural Electric Coöperative, Floydada, Tex., $334,000.

Southwest Arkansas Electric Coöperative Corporation, Texarkana, Ark., $274,000.

Three Notch Electric Membership Corporation, Donalsonville, Ga., $69,000.

Eastern Illinois Power Coöperative, Paxton, Ill., $325,000.

Tipmont Rural Electric Membership Corporation, Linden, Ind., $175,000.

Humboldt County Rural Electric Coöperative, Humboldt, Iowa, $51,000.

Adams County Coöperative Electric Company, Corning, Iowa, $125,000.

Buena Vista County Rural Electric Coöperative, Storm Lake, Iowa, $235,000.

Sac County Rural Electric Coöperative, Sac City, Iowa, $50,000.

North Central Kansas Rural Electrification Coöperative Association, Inc., Belleville, Kans., $535,000.

West Kentucky Rural Electric Coöperative Corporation, Mayfield, Ky., $495,000.

Lyon-Lincoln Electric Coöperative, Inc., Tyler, Minn., $490,000.

Federated Rural Electric Association, Jackson, Minn., $300,000.

Barton County Electric Coöperative, Lamar, Mo., $358,000.

Niobrara Valley Electric Membership Corporation, Spencer, Nebr., a new coöperative, $520,000.

Caddo Electric Coöperative, Binger, Okla., $402,000.

Southwest Rural Electric Association, Inc., Tipton, Okla., $250,000.

Harmon Electric Association, Inc., Hollis, Okla., $303,000.

Southwest Tennessee Electric Membership Corporation, Brownsville, Tenn., $1,050,000.

City of LaFollette, Tenn., $250,000.

McCulloch County Electric Coöperative, Inc., Brady, Tex., $51,000.

Hall County Electric Coöperative, Inc., Memphis, Tex., $175,000.

Washington Electric Coöperative, Inc., Barre, Vt., $640,000.

Tombigbee Electric Power Association, of Tupelo, Miss., $775,000.

PROFESSIONAL DIRECTORY

• This Directory is reserved for engineers, accountants, rate experts, consultants, and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, design, and construction. » » »

(*Professional Directory Continued on Next Page*)

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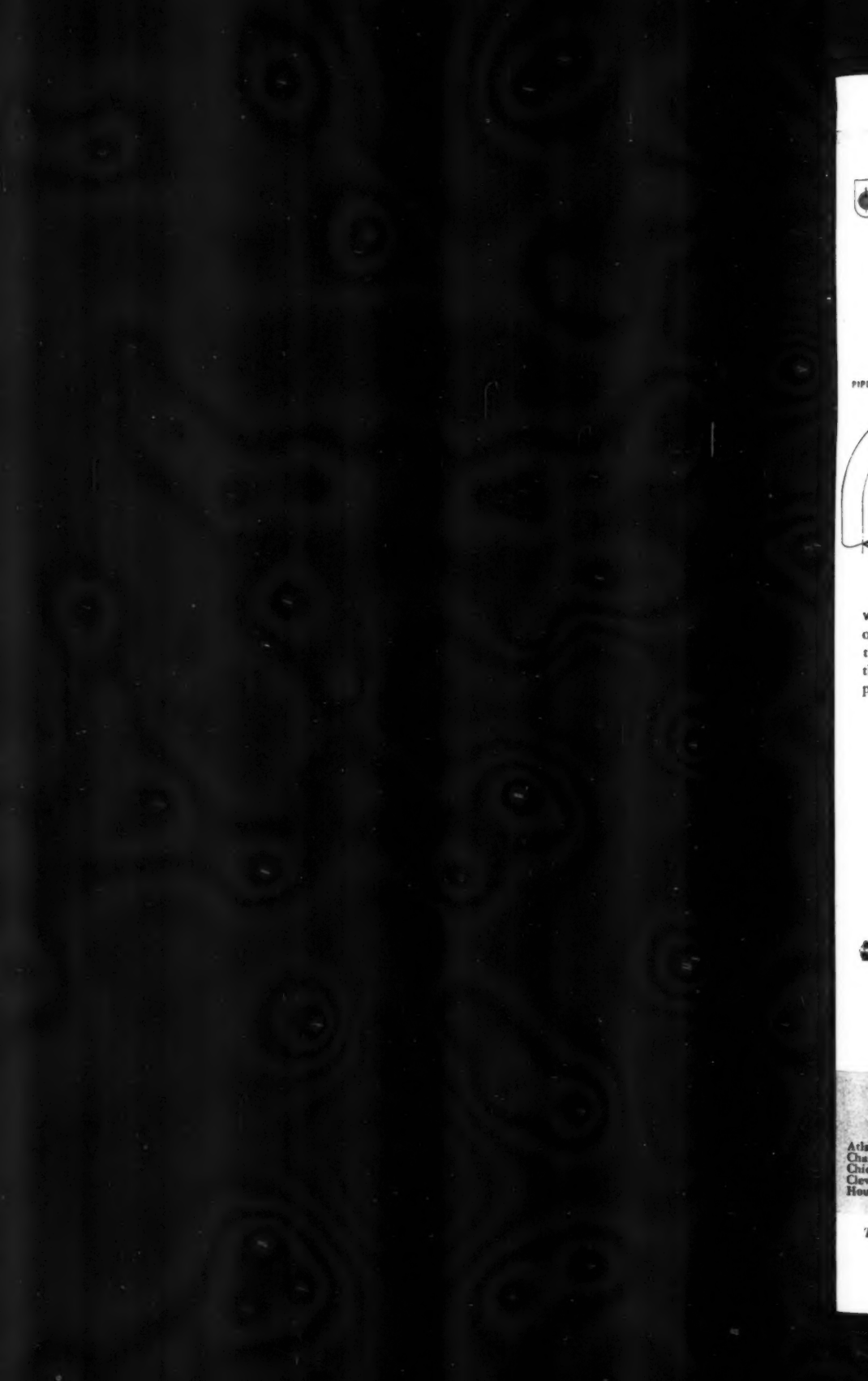

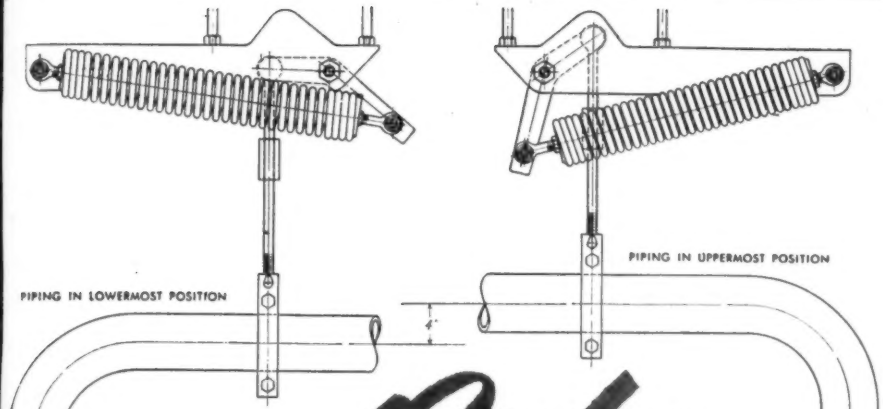

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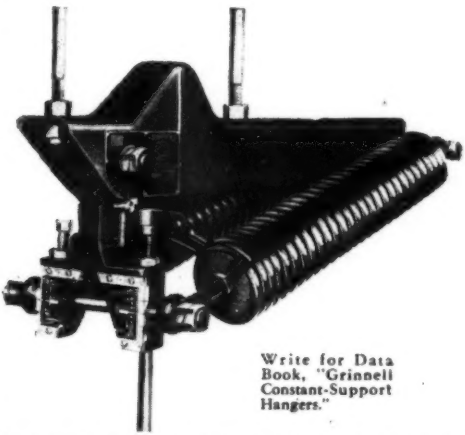

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